



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

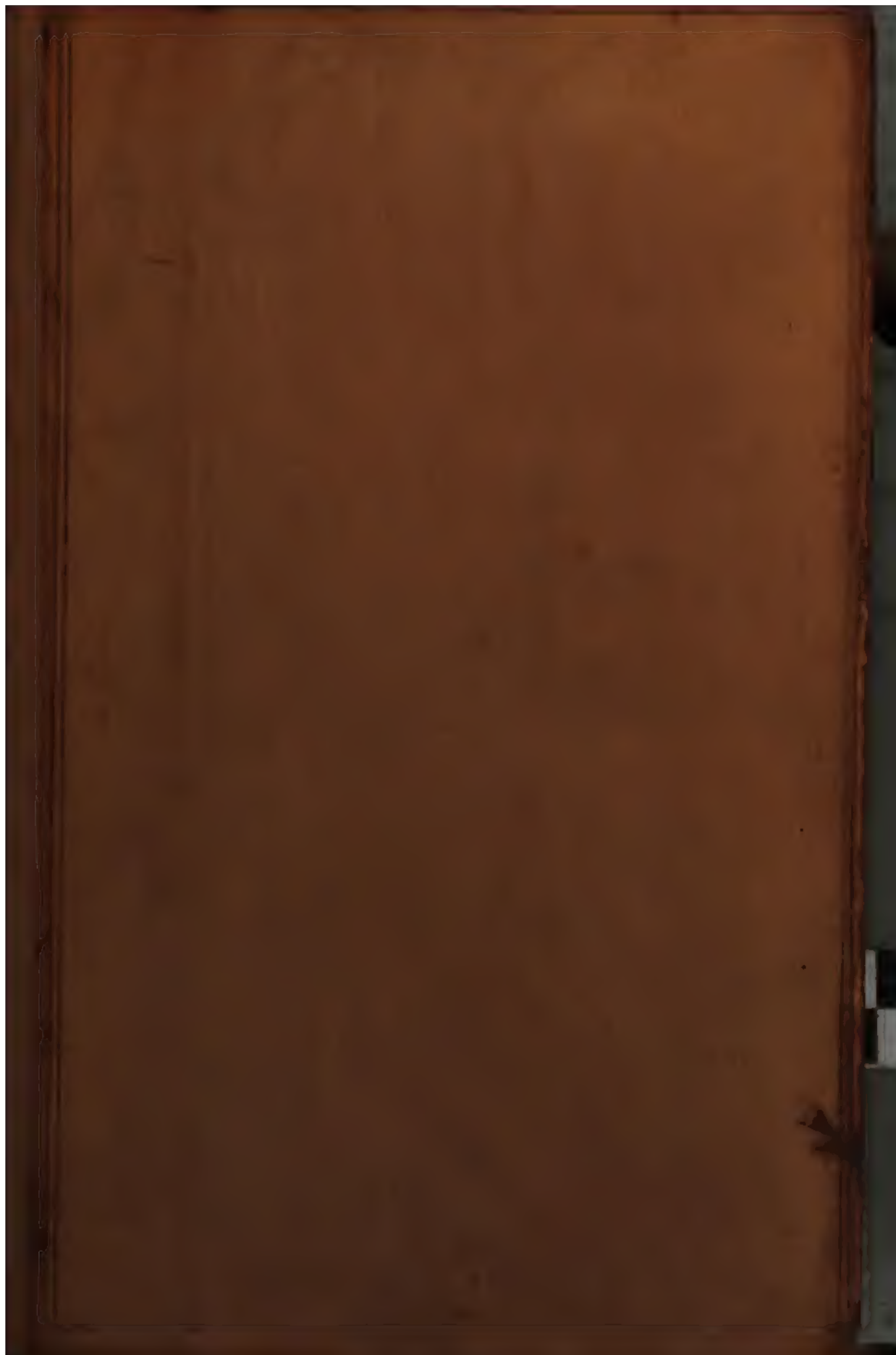
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

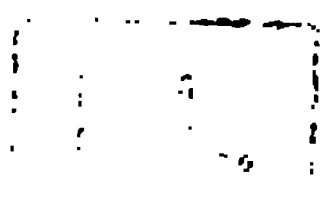




8°

A. 21. 59.

fur:

  
**CW. U. K.**  
**100**  
P 119



8°

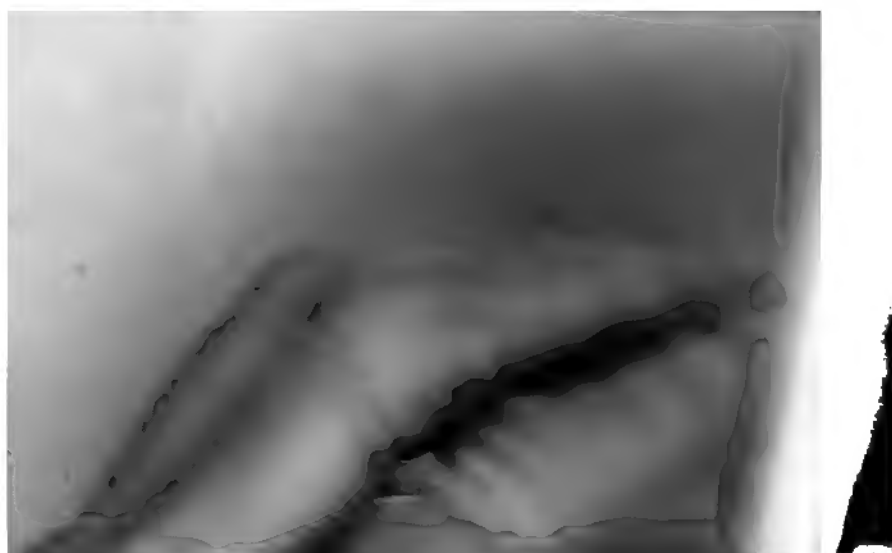
A. 21. 59.

jur:

Cw. U.K.

100

P. 110.



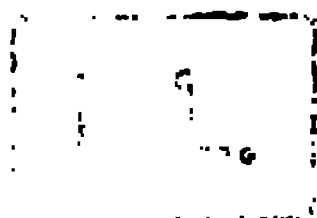
1



8°

A. 21. 59.

jur.



CW. U. K.

100

F 11a

—











**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**The Court of Queen's Bench,**  
**AND UPON**  
**WRITS OF ERROR FROM THAT COURT TO THE**  
**EXCHEQUER CHAMBER,**  
**IN**  
**TRINITY AND MICHAELMAS TERMS, 1840,**  
**AND**  
**HILARY TERM, 1841.**

---

**BY**  
**THOMAS ERSKINE PERRY, ESQ.**  
**AND**  
**HENRY DAVISON, ESQ.**

---

**VOL. IV.**

---

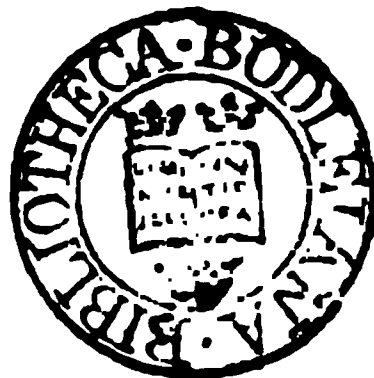
**WITH**  
***AN INDEX OF THE PRINCIPAL MATTERS.***

---

**LONDON:**  
**S. SWEET, 1, CHANCERY LANE; A. MAXWELL & SON, 32, BELL YARD; AND**  
**STEVENS' AND NORTON, 26 & 39, BELL YARD;**  
**Also Booksellers and Publishers:**  
**AND ANDREW MILLIKEN, GRAFTON STREET, DUBLIN.**

---

**1842.**



**L O N D O N :**  
**PRINTED BY C. ROWORTH AND SONS,**  
**BILL YARD, TEMPLE BAR.**

**J U D G E S**  
**OF**  
**THE COURT OF QUEEN'S BENCH,**

*During the period comprised in this volume.*



**The Right Hon. THOMAS LORD DENMAN, C. J.**

**The Hon. Sir JOSEPH LITTLEDALE, Knt.**

**The Hon. Sir JOHN PATTESON, Knt.**

**The Hon. Sir JOHN WILLIAMS, Knt.**

**The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.**



**ATTORNEY-GENERAL.**

**Sir JOHN CAMPBELL, Knt.**

**SOLICITOR-GENERAL.**

**Sir THOMAS WILDE, Knt.**



## MEMORANDA.

---

IN Trinity Vacation last, *William Glover*, of the Middle Temple, Esq., and *Stephen Gaselee*, of the Inner Temple, Esq., were made Serjeants at Law. The former gave rings, with the motto “*Reginâ et lege gaudet serviens*,” the latter, with the motto, “*Nec temerè nec timidè*.” On the ring presented to her Majesty both mottoes were inscribed.

At the conclusion of the sittings in banc in last Hilary Vacation, Mr. Justice *Littledale* resigned, and was shortly afterwards sworn of her Majesty’s Privy Council.

On the resignation of Mr. Justice *Littledale*, *William Wightman*, of Lincoln’s Inn, Esq., was made Serjeant at Law, when he gave rings with the motto “*Æquam servare mentem*.” He was afterwards appointed a judge of this Court, and knighted.

A

# T A B L E

OF

## THE CASES REPORTED

IN THIS VOLUME.

---

The cases signed A. are reported by Mr. ARNOLD, from Mr. PERRY's Notes.  
The cases signed G. are reported by Mr. GALE.

---

	<i>Page.</i>		<i>Page.</i>
A.			
ABRAHAMs v. Skinner .	358	Barry v. Longmore . . .	344
(Ackroyd, Ex parte) Reg. v.		Bayley v. Ashton . . .	204
West Riding, Justices		Bayntun, Collins v. . .	544
of ( <i>post</i> , 1 G. & D. 198)		Beech v. White . . .	399
Adames, Field v. . . .	504	Bennett v. Burton . . .	313
Adams v. Jones . . . .	174	Berwick, Mayor, &c. of, Stea-	
Allen, Doe d. Allen v. . .	220	venson v. . . . .	546
— v. Flicker . . . .	735	Beynon, Doe d. Thomas v.	193
Alternun, Inhab. of, Reg. v.		Birmingham, Bristol and	
( <i>post</i> , 1 G. & D. 261)		Thames Junction Rail-	
Amey, Doe d. Thompson v.	177	way Company v. White	649
Andrews v. Marris ( <i>post</i> , 1 G.		Blewitt, Doe d., v. Phillips .	562
& D. 268)		Blight, Doe d., v. Pett . .	278
Apothecaries' Company v.		Bolton, Reg. v. . . . .	679
Harrison . . . . .	292	Bonney, Brownell v. . . .	523
Appleby, Doe d. Cooling v.	538	Boorman v. Brown (reversed	
Armstrong, Doe d., v. Wilkin-		on error. See 2 G. &	
son . . . . .	323	D. Trin. Vac. 1842) .	401
Ashley, Faithful v. . . .	524	Borton, Rix v. . . . .	182
Ashton, Bayley v. . . .	204	Bowler v. Nicholson . . .	16
Atkins v. Kilby . . . .	145	Braintree Union, Guardians	
		of, Reg. v. . . . .	593
B.		Branson v. Didsbury . . .	441
Bacon v. Smith . . . .	651	Bridgewater, Inhab. of, Reg.	
Baines, Reg. v. . . . .	362	v. ( <i>post</i> , 1 G. & D. 268)	
— Jolly v. . . . .	224	Brooks v. Haigh . . . .	288
Banner, South Eastern Rail-		Brown, Boorman v. (reversed	
way Company v. . . .	246	on error. See 2 G. &	
		D. Trin. Vac. 1842) .	401
		Browne v. Dawson . . . .	355

## TABLE OF CASES REPORTED.

	<i>Page.</i>		<i>Page.</i>
Brownell v. Bonney . . . .	523	Doe d. Norton v. Webster .	270
Bunch v. Kennington . . . .	509, n.	— d. Rees v. Howell .	361
Burder v. Veley . . . .	452	— d. Thomas v. Beynon .	193
Burgess, Williams v. . . .	443	— d. Thomson v. Amey .	177
Burrell, King v. . . .	207	— d. Thompson v. Hodgson	142
Burton, Bennett v. . . .	313		
<b>C.</b>		Done, Hughes v. . . .	708
Cambridge, Mayor, &c. of,		Douglas v. Holme . . .	685
Reg. v. . . . .	294	D'Oyly, Reg. v. . . .	52
Capel, Reg. v. . . . .	87	Drury v. Houndsfield . .	386
Carpenter v. Mason . . . .	439	Dudfield, Edan v. . . .	656
Chawton, Inhab. of, Reg. v.	525	Dunn, Reg. v. . . . .	415
Clift, Doe d. Hamilton v. .	579	<b>E.</b>	
Clifton, Holmes v. . . .	112	Eardley v. Law . . . .	379
Collins v. Bayntun . . . .	544	East Winch, Inhab. of, Reg. v.	342
Cooling, Doe d., v. Appleby	538	Eastern Counties Railway	
Coombs, Fryer v. . . . .	120	Company, Reg. v. . . .	46
Croft, Kitching v. . . . .	339	Easton, In re . . . . .	558
Cromford Canal Company		Edan v. Dudfield . . . .	656
and Wright, In re . . . .	730	Edden v. Ward . . . . .	155
Culverson v. Melton . . . .	445	Evans v. Rees ( <i>Holding wit-</i>	
Currie, Rothschild v. . . .	737	ness to bail) . . . . .	32
Custance, Rogers v. . . . .	574	— v. — (Judgment nunc	
<b>D.</b>		pro tunc) . . . . .	36
Davies, Doe d., v. Davies .	141	— Reg. v. . . . .	719, n.
— v. Stacey . . . . .	157	— Tuson v. . . . .	396
Dawson, Browne v. . . . .	355	Elliott v. Kendrick . . .	306
Dayrell v. Hoare . . . . .	114	Exminster, Inhab. of, Reg. v.	69
Delisser v. Towne . . . .	644	<b>F.</b>	
Didsbury, Branson v. . . .	441	Faithful v. Ashley . . .	524
Dodsley v. Varley . . . .	448	Fereday, Doe d. Hartwright v.	287
Doe d. Allen v. Allen . . .	220		
— d. Armstrong v. Wilkin-		Field v. Adames . . . .	504
son . . . . .	323	Fisher v. Ford . . . . .	347
— d. Blewitt v. Phillips .	562	— v. Lee . . . . .	447
— d. Blight v. Pett . . . .	278	Flicker, Allen v. . . . .	735
— d. Cooling v. Appleby	538	Ford, Fisher v. . . . .	347
— d. Davies v. Davies . . .	141	Forsyth, Harden v. . . .	547
— d. Garrod v. Olley . . . .	275	Foster, Mitchell v. . . .	150
— d. Hartwright v. Fereday	287	Fox v. Waters . . . . .	1
— d. Hamilton v. Clift . . .	579	Fryer v. Coombs . . . .	120
— d. Lean v. Lean . . . .	662	<b>G.</b>	
— d. Nicholson v. Welford	77	Garrod, Doe d., v. Olley .	275

# TABLE OF CASES REPORTED.

vii

*Page.*  
Great Western Railway Com-  
pany, Rouch v. . . 686

## H.

Haigh, Brooks v. . . . 288  
Hamer, South-Eastern Rail-  
way Company v. . . 246  
Hamilton, Doe d., v. Clift . 579  
Harden v. Forsyth . . . 547  
Harrison, Apothecaries' Com-  
pany v. . . . . 292  
Hartley, Wedgwood v. . . 84  
Hartwright, Doe d., v. Fereday  
287  
Hearne v. Stowell . . . 696  
Hebblewhite, South-Eastern  
Railway Company v. 246  
Hedger, Reg. v. . . . . 61  
Henniker, Taylor v. . . . 242  
Hewitt v. Hewitt . . . . 598  
Hoare, Dayrell v. . . . . 114  
Hodgson, Doe d. Thompson v.  
142  
Holme, Douglas v. . . . . 685  
Holmes v. Clifton . . . . 112  
Holt, Oldershaw v. . . . . 307  
Hopkins, Reg. v. . . . . 550  
Houndsfield, Drury v. . . 386  
How, Reg. v. . . . . . 320  
Howell, Doe d. Rees v. . . 361  
Huetson, Squire v. . . . . 633  
Hughes v. Done . . . . . 708

## J.

Jolly v. Baines . . . . . 224  
Jones, Adams v. . . . . 174  
—— Reg. v. . . . . . 520  
—— Williams v. . . . . 217

## K.

Kelk, Reg. v. . . . . . 185  
Kendall, Reg. v. . . . . 603  
Kendrick, Elliott v. . . . 306  
Kennington, Bunch v. . 509, n.

*Page.*  
Kensington, Inhab. of, Reg. v.  
327

Kilby, Atkins v. . . . . 145  
King v. Burrell . . . . . 207  
Kitching v. Croft . . . . 339  
Knight v. M'Dowall . . . 168

## L.

Ladd v. Thomas . . . . . 9  
Law, Eardley v. . . . . 379  
Lean, Doe d., v. Lean . . 662  
Lee, Fisher v. . . . . . 447  
Leeds, Mayor, &c. of, Reg. v. 632  
Lewis v. Reilly . . . . . 629  
Longmore, Barry v. . . . 344  
Lynch v. Nurdin . . . . . 672

## M.

M'Dowall, Knight v. . . . 168  
Maldon, Mayor &c. of v. Wool-  
vet . . . . . 26  
Marris, Andrews v. (*post*, l  
G. & D. 268)  
Mason, Carpenter v. . . . 439  
Melsonby, Inhab. of, Reg. v. 515  
Melton, Culverson v. . . . 445  
Milligan v. Wedge . . . . 714  
Mitchell v. Foster . . . . 150

## N.

Neale v. Postlethwaite . . 623  
Newton, Towers v. . . . . 625  
Nicholson, Bowler v. . . . 16  
——— Doe d., v. Welford 77  
Norton, Doe d., v. Webster 270  
Nurdin, Lynch v. . . . . 672

## O.

Oldershaw v. Holt . . . . 307  
Olley, Doe d. Garrod v. . . 275  
Osborn, Pigeon v. . . . . 345  
Oxford & Witney Roads, Trus-  
tees of, Reg. v. . . . . 154



	<i>Page.</i>		<i>Page.</i>
<b>P.</b>			
Peerless, In re . . . . .	528	Reg. v. Kensington, Inhab. of	327
Pett, Doe <i>d.</i> , v. Blight . . .	278	— v. Leeds, Mayor of, &c.	632
Phillips, Doe <i>d.</i> Blewitt v.	562	— v. Melsonby, Inhab. of	515
Pigeon v. Osborn . . . . .	345	— v. Oxford and Witney	
Postlethwaite, Neale v. . . .	623	Roads, Trustees of . . . .	154
Powell, Reg. v. . . . .	719	— v. Powell . . . . .	719
Preston, Inhabitants of . . .	509	— v. Preston, Inhab. of	509
Purchell v. Salter (reversed		— v. Quayle . . . . .	442
on error, <i>post</i> , 1 G. & D.		— v. Robinson . . . . .	391
682)		— v. St. Giles in the Fields,	
		Inhab. of ( <i>post</i> , 1 G. &	
<b>Q.</b>		D. 557)	
Quayle, Reg. v. . . . .	442	— v. St. John's Margate,	
		Inhab. of . . . . .	653
<b>R.</b>		— v. St. Pancras, Vestrymen	
Rees, Doe <i>d.</i> , v. Howell . . .	361	of . . . . .	66
— Evans v. ( <i>Holding wit-</i>		— v. St. Peter's, Exeter, Pre-	
<i>ness to bail</i> ) . . . . .	32	sident and Chapter of, . . .	252
— v. ( <i>Judgment nunc</i>		— v. Shepherd . . . . .	534
<i>pro tunc</i> ) . . . . .	36	— v. Stamper . . . . .	539
Reg. v. Alternun, Inhab. of,		— v. Sterry . . . . .	122
( <i>post</i> , 1 G. & D. 261)		— v. Stewart . . . . .	349
— v. Baines . . . . .	362	— v. Todd . . . . .	335
— v. Bolton . . . . .	679	— v. Todmorden Union,	
— v. Braintree Union, Guar-		Overseers of . . . . .	553
dians of . . . . .	593	— v. Traill . . . . .	325
— v. Bridgewater, Inhab.		— v. Victoria Park Company	
of ( <i>post</i> , 1 G. & D. 268)		. . . . .	639
— v. Cambridge, Mayor, &c.		— v. Virrier . . . . .	161
of . . . . .	294	— v. West Riding, Justices	
— v. Capel . . . . .	87	of . . . . .	668
— v. Chawton, Inhab. of	525	— v. West Riding, Justices	
— v. D'Oyly . . . . .	52	of (Ex parte Ackroyd)	
— v. Dunn . . . . .	415	( <i>post</i> , 1 G. & D. 198)	
— v. East Winch, Inhab. of,	342	— v. Whissendine, Inhab.	
— v. Eastern Counties Rail-		of ( <i>post</i> , 1 G. & D. 560)	
way Company . . . . .	46	— v. Wilson . . . . .	130
— v. Evans . . . . .	719, n.	— v. Wiltshire, Justices of,	406
— v. Exminster, Inhab. of,	69	— v. Woolmer . . . . .	137
— v. Hedger . . . . .	61	— v. Worcestershire, Jus-	
— v. Hopkins . . . . .	550	tices of . . . . .	440
— v. How . . . . .	320	Regula Generalis (as to appear-	
— v. Jones . . . . .	520	ances, &c. in ejectment)	522
— v. Kelk . . . . .	185	Reilly, Lewis v. . . . .	629
— v. Kendall . . . . .	603	Rix v. Borton . . . . .	182
		Robinson, Reg. v. . . . .	391
		Rogers v. Custance . . . .	574

# TABLE OF CASES REPORTED.

ix

	<i>Page.</i>
Rose, Whyte v. (reversed on error; see 2 G. & D. Hilary Vacation) . . .	199
Rothschild v. Currie . . .	737
Rouch v. Great Western Railway Company . . .	686
Rule of Court (as to appearance, &c. in ejectment) . . .	522

## S.

St. Giles in the Fields, Inhab. of, Reg. v. ( <i>post</i> , 1 G. & D. 557)	
St. John's, Margate, Inhab. of, Reg. v. . . . .	653
St. Pancras, Vestrymen of, Reg. v. . . . .	66
St. Peter's, Exeter, President & Chapter of, Reg. v. . . . .	252
Salkeld, In re . . . . .	732
Salter, Purchell v. (reversed on error, <i>post</i> , 1 G. & D. 682)	
Scott v. Vansandau . . . . .	725
Shepherd, Reg. v. . . . .	534
Sims v. Thomas . . . . .	233
Skinner, Abrahams v. . . . .	358
Smith, Bacon v. . . . .	651
South Eastern Railway Company v. Banner . . . . .	246
————— Hamer . . . . .	246
————— Hebblewhite . . . . .	246
————— Wright . . . . .	246
Squire v. Huetson . . . . .	633
Stacey, Davies v. . . . .	157
Stamper, Reg. v. . . . .	539
Steavenson v. The Mayor, &c. of Berwick . . . . .	546
Sterry, Reg. v. . . . .	122
Stewart, Reg. v. . . . .	349
Stowell, Hearne v. . . . .	696
Strachan v. Thomas . . . . .	229

## T.

Taylor v. Henniker . . . . .	242
Teale, White v. . . . .	43

VOL. IV.

	<i>Page.</i>
Thomas, Doe d., v. Beynon	193
———— Ladd v. . . . .	9
———— Sims v. . . . .	233
———— Strachan v. . . . .	229
Thompson, Doe d., v. Hodgson . . . . .	142
Thomson, Doe d., v. Amey	177
Todd, Reg. v. . . . .	335
Todmorden Union, Overseers of, Reg. v. . . . .	553
Towers v. Newton . . . . .	625
Towne, Delisser v. . . . .	644
Traill, Reg. v. . . . .	325
Tuson v. Evans . . . . .	396

## V.

Vansandau, Scott v. . . . .	725
Varley, Dodsley v. . . . .	448
Veley v. Burder . . . . .	475
Victoria Park Company, Reg. v. . . . .	639
Virrier, Reg. v. . . . .	161

## W.

Ward, Edden v. . . . .	155
Waters, Fox v. . . . .	1
Webster, Doe d. Norton v. . . . .	270
Wedge, Milligan v. . . . .	714
Wedgewood v. Hartley . . . . .	84
Welford, Doe d. Nicholson v. . . . .	77
West Riding, Justices of, Reg. v. . . . .	668
————, Reg. v. (Ex parte Ackroyd) ( <i>post</i> , 1 G. & D. 198)	
Whissendine, Inhab. of, Reg. v. ( <i>post</i> , 1 G. & D. 560)	
White, Beech v. . . . .	399
———— Birmingham, Bristol & Thames Junction Railway Company v. . . . .	649
———— v. Teale . . . . .	43
Whyte v. Rose (reversed on error. See 2 G. & D. Hilary Vacation) . . . . .	199

b

TABLE OF CASES REPORTED.

	<i>Page.</i>		<i>Page.</i>
Wilkinson, Doe <i>d.</i> Armstrong		Woolvet, Mayor, &c. of Mal-	
<i>v.</i> . . . . .	323	don <i>v.</i> . . . . .	26
Williams <i>v.</i> Burgess . . . .	443	Worcestershire, Justices of,	
——— Jones <i>v.</i> . . . .	217	Reg. <i>v.</i> . . . .	440
Wilson, Reg. <i>v.</i> . . . .	130	Wright and Cromford Canal	
Wiltshire, Justices of, Reg. <i>v.</i>	406	Company, In re . . .	730
Woolmer, Reg. <i>v.</i> . . . .	137	——— South Eastern Rail-	
		way Company <i>v.</i> . .	246

ERRATUM.

P. 220, in marginal note to *Doe v. Allen*, for devise to “*T.*” *A.* read  
devise to “*J.*” *A.*

# CASES

ARGUED AND DETERMINED

IN THE

*COURT OF QUEEN'S BENCH,*

IN

TRINITY TERM,

IN

THE THIRD YEAR OF THE REIGN OF VICTORIA.

---

The Judges in Banc this Term were,  
Lord DENMAN C. J. . . . . PATTESON J.  
LITTLEDALE J. . . . . WILLIAMS J.

---

In the Bail Court,  
COLERIDGE J.

---

JOB FOX, Administrator of THOMAS FOX, r. FRANCIS and  
WILLIAM WATERS, Executors of THOMAS WATERS.

*Monday,  
June 1st.*

**COVENANT.** The declaration stated, that on the 20th December, 1796, by an indenture then made between

A declaration  
in covenant,  
against execu-  
tors for a

breach of covenant for quiet enjoyment of an estate for life, against all having lawful title from the testator, alleged that the defendants having lawful title entered. The plea traversed that the covenant of testator was broken during the continuance of the said term:—Held, that, although the plea was demurrable for making such a general traverse, yet, as the declaration was also bad, for not alleging that the defendant entered, having lawful title from the testator, it must be taken that the plaintiff had alleged a sufficient breach in his declaration, and that the averment of lawful title meant mesne title derived from the testator, and that this being so, the plea put the title in issue.

To shew the lawful title of the defendants, the plaintiff proved that they had taken possession of the estate, and also proved admissions by one of them, that they held it under a deed of gift from the testator prior to the covenant declared upon:—Held, that, as the allegation that the defendants having lawful title entered was not divisible, plaintiff was bound to prove a joint title in the defendants, and that the admission by one, as to their holding under the deed of gift, was not evidence against the other:—Held, also, that, although the admission was made by one of two co-executors, it was not made by him *quâ* executor, and therefore did not admit a breach of covenant by the testator.

*Quere*, whether, if the admission of the deed of gift had been made by a sole defendant, this would have dispensed with further proof of the deed.

1840.

  
 Fox  
 v.  
 Waters.

*Thomas Waters* and *Elizabeth* his wife, of the one part, and *Robert Willis* and *Thomas Fox*, of the other part, the said *Thomas Waters* did bargain, sell, assign, transfer, and set over unto the said *Thomas Fox* and *Robert Willis*, their heirs, executors, administrators and assigns, certain messuages or tenements, &c., in the indenture mentioned, to have and hold the same unto the said *Robert Willis* and *Thomas Fox*, their heirs, executors, administrators and assigns for and during all the rest, residue, and remainder then to come therein, of certain terms therein expressed, &c., for and upon the certain uses, ends, trusts, intents and purposes in the indenture declared. Averment, that *Thomas Waters* did, by this indenture, covenant for quiet enjoyment against himself, his heirs, executors or administrators, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his or their acts, means, consent, default, privity or procurement &c. Averment of entry by *Robert Willis* and *Thomas Fox*, and of the death of *Willis* during the lifetime of *Thomas Fox*, whereby, and till the time of his death, *Thomas Fox* then became solely possessed of the said premises. Averment, that after the respective deaths of the said *Thomas Waters*, *Willis*, and *Thomas Fox*, and during the continuance of the terms and estates by the indenture granted and created, the said messuages or tenements &c. were not suffered to remain, or to be to, or for, or upon the several uses, trusts, nor subject to the several provisions or agreements in the said indenture mentioned, &c.; but, on the contrary thereof, after the making of the indenture, and after the respective deaths of *Thomas Waters*, *Willis* and *Thomas Fox*, and during the said terms &c., to wit, on the 1st April, 1825, the defendants, *who*, at the time of the making of the said indenture hereinbefore mentioned, had, and continually from thence hitherto *have had, and still have lawful right and title* to the said messuages &c., did enter into and upon the possession of the said messuages &c., and ejected, expelled and removed the plaintiff, admi-

nistrator to *For*, from the possession thereof, and the defendants kept and held, and still keep and hold possession of the said premises, and every part thereof, from the plaintiff, as administrator as aforesaid &c. And so the plaintiff in fact says, that the defendants, executors as aforesaid, after the death of the said *Thomas Waters*, have not nor hath either of them kept the said covenants so made by the said *Thomas Waters* as aforesaid, but have broken the same &c.

1840.  
  
*Fox*  
*v.*  
*WATERS.*

Plea : 2. That heretofore, and long before the commencement of this suit, to wit, on 1st January, 1830, the said terms and estates in the said declaration mentioned were, and each and every of them was ended and determined, and that the said covenant of the said *Thomas Waters* was not in any manner broken during the continuance of the said terms and estates. Verification.

Replication to the 2nd plea : That the said covenant of the said *Thomas Waters* was broken during the continuance of the said terms and estates, to wit, at the time and in the manner in the declaration mentioned. Issue thereon.

At the trial of this cause, before *Coltman J.*, at the Somersetshire summer assizes, 1838, it appeared that the action was brought to recover damages for a breach of covenant for quiet enjoyment, contained in a settlement made by *Thomas Waters*, in 1796, on *Elizabeth*, his second wife, by which he had settled certain estates, pur autre vie, on himself for life, remainder to his wife for life, with power of appointment by will. The defendants were the executors of *Thomas Waters*, and his sons by a previous marriage.

*Thomas Waters*, the settlor, died in August, 1805, and after his death his widow, *Elizabeth Waters*, continued in the undisputed possession of the property till her death in March, 1825, having first made her will, by which she devised the property in question to her niece and sister. Upon the death of Mrs. *Waters* the defendants obtained possession of the property, and the defendant, *Francis Waters*, continued in possession up to action brought. It appeared that in 1827, on the attorney for the plaintiff, and for the

1840.  
  
 FOX  
 v.  
 WATERS.

parties beneficially interested under Mrs. *Waters*' will, applied to *Francis Waters* to give up possession, when he said that the property belonged to him and his brother (the other defendant), under a deed of gift, which his father had made long before the settlement.

The same witness afterwards met *Francis Waters* in 1831, on this business, at the residence of the attorney of the latter, when the settlement of 1796 was produced, and *Francis Waters* again asserted that his father had made over the property to him and his brother by a deed of gift, and he repeated the assertion on several occasions before action brought. It was contended for the defendants that, if this evidence was relied upon to shew that the defendants entered the premises with lawful title, the deed of gift should be produced, and that at all events, the declarations of one defendant, as to the contents of the deed, could not bind his co-defendant. His lordship reserved the point, and the verdict passed for the plaintiff.

*Crowder*, in the ensuing Michaelmas term, having obtained a rule nisi for a nonsuit,

*Bompas Serjt.* and *W. H. Watson* now shewed cause. It was not necessary, on the issue joined in this action, to prove that the defendants had lawful title when they entered. The plea alleges that "the covenant of *Thomas Waters* was not broken during the continuance of the said terms," not traversing that it was broken modo et formâ; it therefore does not put in issue the title of the defendants, which must be taken to be admitted on the pleadings. The plea is besides bad. [*Patteson J.* If the plea is bad (a), the declaration is also bad, for it does not allege that the defendants entered with lawful title derived from *Thomas Waters*, they may therefore have entered by title paramount, which would be no breach.] Supposing then that it was necessary to prove that the defendants entered with title, the finding them in possession, coupled with the declaration that they held

(a) See Com. Dig. Pleader, 2, (V 5).

under a deed of gift, is sufficient. Just as one who is found in possession may be charged as assignee, although an assignment can only be by writing, *Doe v. Murless*(a). So also in *Moore v. Walker*(b), although an assignment of a copyright can only be made in writing, it was held that the plaintiff's having stated that he had parted with all his interest in the copyright, was proof that he had parted with it by writing; and it is an established rule, that any admission by a party to the record may be given in evidence against him, *Bauerman v. Radenius*(c), even although it relates to the contents of a written document, *Earle v. Picken*(d). The case of *Abbot v. Plumbe*(e), which is relied upon by the other side, does not apply. It was decided there that, where a bond is produced, no admission by the obligor would dispense with the necessity for calling the attesting witness. Here it did not appear that there was any attesting witness, and it was not necessary to produce the deed of gift, that being the title under which the defendants held. The next question is, whether the admission of one defendant was binding on both. To solve that, the position of these defendants, as co-executors, must be looked at, and it will be seen that the statement of the defendant, *Francis*, is an admission that the testator broke his covenant, and therefore it is binding on his co-executor. An assignment of a lease by one would operate as an assignment by both, and the act of one in realising assets is the act of the other also, 1 *Williams' Executors*, 654(f). Lastly, it was not necessary to prove that both the defendants had lawful title. If one only entered, having lawful title, that would be a breach of the testator's covenant, and make them both liable, and it is never necessary to prove more than the substantial part of an averment, *Jones v. Clayton*(g), *Ricketts v. Salwey*(h). [*Littledale J.* In both those cases the aver-

1840.  
  
 Fox  
 v.  
 Waters.

(a) 6 Mau. &amp; S. 110.

(b) 4 Campb. 9, n.

(c) 7 T. R. 663.

(d) 5 C. &amp; P. 542.

(e) 1 Dougl. 216.

(f) 2d ed.

(g) 4 Mau. &amp; S. 349.

(h) 2 B. &amp; Ald. 360.



1840.

  
 Fox  
 v.  
 Waters.

ments were divisible.] If the question had been, whether there was a variance, the plaintiff would have been entitled to recover,

*Crowder* contra. With regard to the issue, although the plea may be demurrable it denies the whole breach alleged in the declaration. But the gist of the action is, that the defendants entered having lawful title. The plea denies this, and therefore the plaintiff is bound to prove that they had lawful title. [Lord *Denman* C. J. The question is, whether the admission of one of the defendants that they held under a deed of gift is not *primâ facie* evidence of a title.] The plaintiff has taken upon himself the burden of proof of a lawful title, and he was bound to prove it in the regular way, just as in *Abbot v. Plumbe* (a), where the plaintiff relied upon the admission of a bond by the obligor, yet, as the existence of the bond formed a part of the plaintiff's case, he was called upon to prove it like any other bond. The mere fact of the defendants taking possession, and claiming the property under a deed of gift from the testator, cannot make the testator's estate liable for a breach of covenant, without proof of the deed. If there were no such deed the defendants might have been turned out by ejectment. Then with regard to the declaration of one co-executor binding the other, no doubt that is so, where it has relation to the assets of the testator, but not in any other case. The two defendants undoubtedly were both found in possession, but their interest was not shewn to be joint, and it is clear the statement by *Francis* was not made *quâ* executor. The effect of the acts of one co-executor as binding the other, was much considered in *Nation v. Tozer* (b).

LORD DENMAN C. J.—This is a peculiar case, and is not rendered less so by the state of the pleadings. But we are bound to consider that, on the face of the declaration,

(a) 1 Dougl. 216.

(b) 1 C., M. & R. 172.

the plaintiff has taken upon himself to allege that the defendants entered, having lawful title from the testator, for otherwise he could allege no breach. That being so, and the plea traversing that the covenant of the testator was broken during the continuance of the terms, we must take it that the whole of the breach in the declaration is in issue, and not merely the time of the expiration of the term. The question then is, whether the admission of the deed by the defendants obviates the necessity of producing the instrument; but that is so large a question that no one would wish to face it needlessly, and on this occasion it is unnecessary to consider it, because I think that under the circumstances the admission of one defendant could not bind the other. Although on many points connected with assets the declaration of one executor is so binding, I think the admission of one, involving his opinion as to the legal effect of a deed, never can be held to have the same effect. On this short ground I think the rule must be absolute.

1840.  
~~~~~  
FOX  
v.  
WATERS.

LITLEDALE J.—The pleadings are extraordinary; for the declaration is bad, in not alleging that the defendants entered with lawful title under the settlor, and therefore contains no breach; and the plea is also bad, for it amounts to *non infregit conventionem*. However, on this bad declaration and bad plea issue is joined, and we must take it that the issue is, whether the defendants entered, having lawful title from the testator. The question then is, whether an admission by one of them, that they hold under a deed of gift, is proof of the title. These executors, it is clear, do not claim as executors; they either claim under a deed from the testator himself, or from some person to whom he had conveyed previously; it follows, therefore, that the admission of one cannot bind the other, as executor. If the admission had been with regard to assets it would have been different.

PATTESON J.—The first question is, whether the title

1840.  
  
 Fox  
 v.  
 WATERS.

of the defendants is put in issue at all on these pleadings, and I think it is a satisfactory answer to say that, if the plea is not correct in form, neither is the declaration, and that the lawful title mentioned in the latter must be taken to mean title under the settlor, and, although the plea is in form demurrable, yet that the meaning of it is, that there was no actual entry into the premises with lawful title by the defendants. It therefore lay upon the plaintiff to shew that the defendants did enter with such lawful title, and the only evidence given was the declaration by one that they held under a deed of gift. Without giving any opinion at all whether that would have been evidence if there had been one defendant only, as I consider it a very grave question, I am clearly of opinion that it is not evidence against two defendants, in whom no *joint* interest whatever was shewn. It is contended that proof of lawful title in one defendant is sufficient, on the authority of *Jones v. Clayton* (a), and *Ricketts v. Salwey* (b), but in those cases the allegations were divisible. Here the assertion is, that the defendants entered, having lawful title, which means joint title, and therefore should have been proved. I say then that the admission by one is not evidence against both, because the admission is not connected with any proof of a previous joint interest. I was struck, however, with an ingenious argument of my brother *Bompas*, that the declaration of *Francis Waters* was an admission by one executor as to a breach of covenant by the testator. But on looking into the evidence, I do not think that is the fair import of it, and that the admission only amounted to a claim as to his right title to the land, without reference to his character as executor.

WILLIAMS J.—I agree that on the latter point the rule must be absolute. The other question, as to whether the admission by the defendant would dispense with the pro-

(a) 4 Mau. & S. 349.

(b) 2 B. & Ald. 360.

duction of the deed, is one of more difficulty, and the case of *Abbot v. Plumbe* (a) does not solve it. There the question was, whether, where a bond was produced, an admission by the obligor prevented the necessity of calling the attesting witness, and it was held that it did not, but that may have proceeded on the technical rule, that the subscribing witness to a bond must always be called. On the question now before the Court the point is, whether an admission of any kind by one defendant binds his co-defendant, and it is clear that it does not, unless a joint interest is shewn. It does so in partnership for that reason, but in other cases, such as trespass for example, the admission of one defendant would not bind the other, because there is no joint interest between them.

1840.  
  
 Fox  
 v.  
 WATERS.

Rule absolute.

(a) 1 Doug. 216.



LADD v. THOMAS and another.

Friday,  
 June 5th.

**TRESPASS** for breaking and entering the dwelling-house of the plaintiff, and continuing there for five days, and also for seizing the plaintiff's goods and converting them to the defendants' use. Pleas:—1st. Not guilty. 2d. That the plaintiff for half a year next before and ending on the 24th June 1836, and from thence until and at the said time when &c., held and enjoyed the said dwelling-house, in which &c.,

1. After a distress for rent has been impounded, tender of the rent and charges is too late.

2. Trespass for entering the plaintiff's dwelling-

house, and continuing therein five days, and seizing the plaintiff's goods. The defendant justified, under a distress for rent, stating his entry, seizure of the goods, and impounding them on the premises. Plaintiff now assigned that, after the defendant entered, and after the plaintiff made a sufficient tender of the rent and charges, and after the defendant ought to have quitted the premises, the defendant remained in the dwelling-house, &c. Plea to the new assignment, traversing the tender. After verdict for the plaintiff, the Court arrested the judgment, on the ground that it did not appear from the pleadings that the tender was made before the goods were impounded, and that the omission was not cured by verdict, also per *Patteson J.* that it did appear from the pleadings that the tender was made *after* the impounding.

3. *Semble*, trespass lies for a wrongful continuance in possession after a distress made, per Lord Denman, C. J.

1840.

LADD  
v.  
THOMAS.

as tenant to one *Mary Packwood* and others, under a certain demise theretofore made at the yearly rent of 2*l.* payable quarterly. Averment, that on the 24th June, 1836, 10*l.* 10*s.* for half a year's rent was then due, whereupon the defendants, as bailiffs of *Mary Packwood &c.* and by their command, entered into and upon the said dwelling-house, in which &c., and seized, took, and distrained the said goods and chattels &c. then being in the said dwelling-house &c., as and for and in the name of a distress for the rent so due, and in arrear as aforesaid, and which still remains due and unpaid, and then impounded the same in the most fit and convenient part of the said dwelling-house in which &c. for that purpose, according to the form of the statute in such case made and provided, for which purpose they remained and continued in the said dwelling-house, in which &c. for a reasonable space of time, to wit, for the time in the declaration mentioned, *quæ est eadem &c.*

Replication to the first plea, similiter: to the second, *precludi non*, because the plaintiff saith that he issued his writ against the defendants and commenced his action thereupon, not only for the trespasses in the second plea mentioned, and thereby attempted to be justified, but also for that after the defendants had entered into and upon the said dwelling-house as in the second plea mentioned, and for the purposes in the said plea mentioned, and after the plaintiff had offered and tendered to them the defendants, to wit, on the 29th September, in the year aforesaid, in satisfaction and discharge of the arrears of rent in the second plea mentioned, and of the costs and charges of the distress in the second plea mentioned, a large sum of money, to wit, 11*l.* 13*s.*, the same being then a sufficient sum to satisfy and discharge the said arrears of rent in the second plea mentioned, together with all the costs of the said distress, and after they, the defendants, ought to have quitted the said dwelling-house in which &c., and to have given up and restored to the plaintiff the goods and chattels so by the defendants seized &c. as in the second plea mentioned, they

the defendants, remained and continued in the said dwelling house in which &c., making a noise and disturbance therein for a long space of time, to wit, for two days next after the 29th September in the year aforesaid, which said two days are part of the time in the declaration and in the second plea respectively mentioned; and also after the said 29th September converted and disposed of the said goods and chattels &c. which trespasses above newly assigned are other and different trespasses from the trespasses in the second plea mentioned, and thereby attempted to be justified, and this the plaintiff is ready to verify. Wherefore, inasmuch as the defendants have not answered these trespasses above newly assigned, the plaintiff prays judgment, and his damages by him sustained on occasion of the committing thereof to be adjudged to him &c.

Plea to the new assignment: that the plaintiff did not offer and tender to the defendants, or either of them, in satisfaction and discharge of the arrears of rent in the second plea mentioned, and of the costs and charges of the said distress, any sum of money sufficient to satisfy and discharge the arrears of rent in the second plea mentioned, together with all costs and charges &c. modo et formâ. Issue thereon.

At the trial before Lord *Denman* C. J. at the sittings in Middlesex after Michaelmas term 1838, the verdict passed for the plaintiff with 40*l.* damages.

*Platt*, in the ensuing term, obtained a rule nisi to arrest the judgment on the grounds, 1st. That the verdict had been entered not only for the trespasses newly assigned, but also for those which had been justified; 2d. That the action should have been in case; 3d. That the tender to a bailiff was insufficient; and 4th. That tender after the goods had been impounded was insufficient.

*Erle* and *Knowles* now shewed cause. 1st. The ground of the first objection is that the plaintiff, in his new assignment, professes to proceed *not only* for the trespasses jus-

1840.

LADD  
v.  
THOMAS.

1840.

~~~~~  
LADD  
v.  
THOMAS.

tified, but also &c., but it appears by his prayer of judgment that he only asks for judgment for the trespasses newly assigned. The new assignment is copied from the form in *Chitty* (a). [*Patteson* J. In that form the new assignment traversed the right of way, as well as assigned another trespass *extra viam*. Here the pleader has omitted to traverse the justification as to part of the trespass.] At most it is only a discontinuance if there is no answer to the justification referred to, and a discontinuance is cured after verdict by 32 *Hen.* 8, c. 30. 2nd. The action is rightly brought in trespass. Although Lord *Ellenborough* threw out a doubt upon the point in *Winterbourne v. Morgan* (b), the rest of the Court differed from him, and *Etherton v. Popplewell* (c), *Holland v. Bird* (d), *Vertue v. Beasley* (e), and *Griffin v. Scott* (f), are all authorities that trespass is the proper form of action; *Branscomb v. Bridges* (g) and *Smith v. Goodwin* (h) may also be referred to on this point. 3dly. It is said a tender made to a bailiff is insufficient, and it is true that the law is so laid down in *Pilkington's* case (i), but that was before the statute allowing distresses to be impounded on the premises (11 *Geo.* 2, c. 19), and, as is observed in a note (k) by the editors of *Coke's Reports*, tender to a bailiff who has special authority to distrain is sufficient, and it must be taken that, wherever a distress is taken by a bailiff, and impounded on the premises, he has an implied special authority to receive the rent, and it certainly is most convenient that the party on the premises should have such authority. *Smith v. Goodwin* (h), already cited, merely shews that the converse, viz. a tender to the landlord, is sufficient. 4th. It is said the tender appears to have been made *after* the goods were impounded, and that

(a) 3 Chitt. Pl. 1140, 6th ed.

(b) 11 East, 395.

(c) 1 East, 139.

(d) 10 Bing. 15.

(e) 1 M. &amp; Rob. 21.

(f) 2 Raym. 1424.

(g) 1 B. &amp; C. 143; S. C. 2 D. &amp; R. 256.


(h) 4 B. &amp; Ad. 413; S. C. 2 N. &amp; M. 114.

(i) 5 Rep. 76 a.

(k) See ed. 1826, by Thomas and Fraser.

for this reason also the tender is insufficient. Many cases, no doubt, shew that this was the law when the goods were impounded in the common pound, for then they were in the custody of the law, and it was no longer in the option of parties to deliver them. But, if any cases decide that the same law applies to a distress impounded on the premises, they cannot be supported. In *Smith v. Goodwin* no doubt the goods had been impounded before the tender, though the fact is not stated. The 2 *W. & M.* sess. 1, c. 5, which allows a distress for rent to be sold, unless replevied within five days, implies that, where rent is due, a tender within five days is good. It is true that, in *Firth v. Purvis*(a), it was held that a tender after the goods were impounded was insufficient, but that was an action for pound breach, and the defendant, although he might be entitled to his goods, could not be justified in breaking the pound. All the other cases, in which a tender has been held insufficient, were cases of distress damage feasant, as to which there may be a difference, the cattle there being detained in the open custody of the law. But it is submitted that it does not appear here that the tender was made after the goods were impounded. It was necessary that the new assignment should allege that the tender was *before*, and, if it alleges that imperfectly, the defendants should have demurred; as they have not done so, it must be taken that the jury, under the direction of his lordship, have found that the tender was before the impounding. The objection therefore is too late after verdict: besides it appears by the plea that the tender was before the impounding.

*Platt* (with whom was *Peacock*) *contra*, was desired by the Court to address himself to the last point. It is laid down clearly in the *Six Carpenters'* case (b), that tender after the impounding comes too late, because then the cause is put to the trial of the law to be there determined. *Firth*

1840.  
  
 LADD  
 v.  
 THOMAS.

(a) 5 T. R. 432. (b) 8 Rep. 146, a, and 1 Smith's Lead. Ca. 62.



1840.

LADD  
v.  
THOMAS.

*Purvis* (a) is also expressly in point; and *Sheriff v. James* (b) and *Anscomb v. Shore* (c) shew that no action will lie in such a case. (He was then stopped.)

LORD DENMAN C. J.—The law is settled that a tender of the sum due, after the goods have been impounded, is insufficient. Here the plea has justified the distress and the impounding. Then the new assignment points out that the action is brought not only for the trespasses attempted to be justified, but also for detaining the goods after a tender had been made. The question then is, when was the tender made, for if it was after the goods had been impounded the defendants were not bound to accept it, and therefore no grievance is shewn. But the plaintiff has not shewn this in any part of his pleadings, and it is too much to ask the Court to presume something probably contrary to the fact. It is unnecessary to say any thing as to the other points, except to intimate that it appears to me that the continuing in possession unlawfully is the subject of trespass, although the opinion of Lord *Ellenborough* in *Winterbourne v. Morgan* (d) seems to have been otherwise.

LITTLEDALE J.—The 11 *Geo. 2*, c. 19, s. 10, allows goods distrained for rent to be impounded on the premises. But there is no distinction in principle between goods so distrained and impounded in a house, and those impounded in the common pound. They are equally in the custody of the law. It is shewn by the plea that the goods were regularly impounded, and therefore to make the tender legal it should have been shewn that it was made before the goods were impounded. The plaintiff has not done so, but has left it uncertain; his new assignment therefore is bad on demurrer, and it is not cured by verdict, because the time of tender formed no part of the issue.

(a) 5 T. R. 432.

(c) 1 Campb. 285; S. C. 1 Taunt.

(b) 1 Bing. 341; S. C. B. Moo. 261.  
334.

(d) 11 East, 395.

PATTESON J.—The rule must be absolute, for tender after the impounding is too late. There can be no doubt that the law is so with regard to distresses impounded damage feasant; *Sheriff v. James* (a), *Anscomb v. Shore* (b). Then is there any distinction between these cases and a distress for rent? The only ground for suggesting a distinction must be founded on the 2 Will. & M. sess. 1, c. 5, which allows goods distrained for rent to be sold after five days. But that statute allows the goods to be sold if the party do not replevy within five days, and does not say a word as to the payment of the rent due; if it had done so, there would have been some ground for the argument. I see, therefore, no distinction between a distress damage feasant and one for rent. The question then is, whether it appears here that the tender was after the goods were impounded? I should say that it does not appear by the new assignment that the tender was after the impounding, for it only says after the defendant's *entry* on the premises and does not say after the *impounding*. But, if this point is left ambiguous by the plaintiff, the verdict does not supply the omission, because it formed no part of the issue, and the judge was not called on to do more than direct the jury as to the terms of the issue, which merely was as to the sufficiency of the amount tendered. On looking at the plea, however, and comparing it with the subsequent pleadings, I think it appears clearly that the tender was after the impounding; because the plea alleges the seizure as a distress, and the *then* impounding them on the premises, and therefore that is admitted by the new assignment, which admits the justification of all that the plea attempted to justify. The impounding admitted, therefore, must have been an impounding before tender.

WILLIAMS J.—It is contended that, if the tender does not distinctly appear to have been made before the impound-

1840.

LADD  
v.  
THOMAS.

(a) 1 Bing. 341.

(b) 1 Campb. 285.

1840.  
 ~~~~~  
 LADD  
 v.  
 THOMAS.

ing, it must be presumed to have been so after verdict. But in the note to *Stennel v. Hogg* (a) Serjt. *Williams* lays down the rule thus: "If the issue joined be such as *necessarily* required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the common law." If then there had been anything in the issue joined, which would have required the proof of the tender being made before the impounding to support it, it would have been implied, after verdict, that such proof had been given. But, as has been pointed out, here the issue was quite collateral.

Rule absolute.

(a) 1 Wms. Saund. 228.

Friday,  
 June 12th.

BOWLER v. NICHOLSON and others,

To trespass for entering the plaintiff's house and taking his goods; the defendants pleaded that on the 5th November, 1838, and for a long time then past, and from thence until and at the time when &c. the plaintiff held a certain other house of certain persons (naming them), as tenant thereof to those persons, under a demise before then made by them, upon which demise a certain weekly rent of 7s. was reserved to them. The plea then stated that rent was in arrear, and that the goods were seized as having been fraudulently removed, from the house demised, to the house in which &c.—Held,

**TRESPASS** for entering the plaintiff's house and taking his goods. Plea:—That the plaintiff, on the 5th November, 1838, and for a long time then last past, and from thence until and at the said time when &c. held and enjoyed certain premises, to wit, a dwelling-house of certain persons (naming them), situate &c. as tenant thereof to the said last-mentioned persons, under and by virtue of a cer-

tain demise before then made by them, upon which demise a certain weekly rent of 7s. was reserved to them. The plea then stated that rent was in arrear, and that the goods were seized as having been fraudulently removed, from the house demised, to the house in which &c.—Held,

1. That the demise was stated with particularity sufficient to be good on general demurrer.

*Quere*, whether plea good on special demurrer.

2. That the plea set up the authority of the plaintiff to follow and seize the goods, it being an authority which the law annexed to the contract made by him as tenant, and that the replication of *de injuriâ* was bad within the 3d resolution in *Crogate's* case.

tain demise thereof, to wit, a demise before then made by the said last-mentioned persons to the plaintiff, upon which said demise a certain weekly rent, to wit, a rent of 7s. was reserved and made payable at the end of each and every week by the plaintiff to the said persons, and the defendants say that, just before the said time, when &c., to wit, on the day and year last aforesaid, a large sum of money, to wit, the sum of 13s. 6d. of the rent aforesaid, for divers, to wit, thirty-nine weeks of the said demise, ending on the day and year last aforesaid, became and was due and payable from the plaintiff to the said persons, and from thence, until and at the said time, when &c. remained and continued due in arrear and unpaid. The plea then stated that after the rent became due, and while the same was in arrear and unpaid, and within thirty days &c. the plaintiff fraudulently and clandestinely carried off from the said premises, so held by him the plaintiff as such tenant to the said house in which &c., the said goods being the proper goods of him the plaintiff, to prevent a distress, without leaving any other goods in the said premises so held by the plaintiff as aforesaid, sufficient to satisfy the said rent. The plea then proceeded to justify, in the usual form, that the defendants, as servants of the landlords, mentioned in the plea, broke the house to which the goods had been fraudulently removed, and seized them for a distress.


Replication, de injuriâ &c.

Special demurrer, on the ground that the replication put in issue not only several distinct facts which were not mere matters of excuse, but an interest in land &c. &c.

*Wightman* in support of the demurrer. [*Littledale J.* Does the plea state the demise with sufficient particularity? Neither the date of the demise nor the term are stated.] The particulars of the demise are immaterial. The plea states all that is necessary, that there was a demise, and an arrear of rent for a certain time being portion of the term, and a fraudulent removal, and that the house was entered

1840.

~~~~~  
BOWLER  
v.  
NICHOLSON.

1840.  
  
 BOWLER  
 v.  
 NICHOLSON.

for the purpose of following the goods in question, and that they were taken as a distress. The plea follows the ordinary precedents, and the language of the 11 *Geo. 2*, c. 19, s. 1. It is not necessary for the landlord to set out his title, for the tenant is estopped from disputing it: and, if the mode of stating the demise can be objected to, this should have been pointed out on special demurrer. No difficulty is imposed on the defendant by stating the demise generally; he might have traversed it, but he has pleaded over, and the plea is good on general demurrer. If the replication is good the demise is traversed, and the defendant would be obliged to prove it. To shew that the replication was bad, he contended that both an interest in land, and also an authority given by law, were set up by the plea, and referred to the second and third resolutions in *Crogate's case* (a), and *Selby v. Bardons* (b).

*Stonor* contra. The plea is bad for omitting to state title, and the objection may be taken on general demurrer; *Grimstead v. Barlowe* (c). It is not contended that the defendant should have deduced title, but he should at least have stated the fact of title. The 22d section of the statute allows a general form of avowry, and applies to replevin only. The 21st is the section which applies to trespass, and enacts that in actions against persons entitled to rents they may plead the general issue; but this section is confined to cases where the entry or other act complained of is made or committed on the land itself demised (d). Where the entry is upon other land to which goods have been fraudulently removed, there must be a special plea of justification notwithstanding the statute; *Furneaux v. Fotherby* (e). The general replication is good, because the plea to which it is an answer claims an interest in land

(a) Rep. 8, 66 b.


(b) 3 B. & Ad. 2; S. C. in error,  
 1 C. & M. 500.

(c) 4 T. R. 717.

(d) So also is the language of  
 the section as to replevin.

(e) 4 Campb. 136.

by way of inducement only. The distinction is recognised in *Hale v. Gerrard* (a), and other cases cited in 2 Wms. Saund. 295, n. (1), and in *Vivian v. Jenkin* (b). No interest anterior to the trespass is claimed either in the land entered upon, or in the goods taken. In *Bardons v. Selby* (c) it is laid down by *Tindal* C. J., in delivering the judgment of the Court, "that the claim of interest mentioned in *Crogate's* case, as forming an exception to the application of the rule there laid down, must mean an interest anterior to, and independent of the fact of seizure, from the instances which are there put of a right of common, or a right of way or passage, and the like; all of which, from their nature, must have existed in the party before the trespass was committed for which the action is brought."

1840.  
  
 BOWLER  
 v.  
 NICHOLSON.

*Wightman* in reply. In *Selby v. Bardons* (d), where the avowry was that the goods were taken to satisfy a poor-rate, no interest was claimed anterior to the trespass. But here the plea does assert a claim to the *particular* goods, as having been, *previously* to the trespass, upon the land demised. [*Patteson* J. There does not appear to have been more of an anterior interest in this case than in *Selby v. Bardons* (d).] The right claimed is to the *particular* goods that have been removed. [Lord *Denman* C. J. It is the same right, for this purpose, as if the goods had remained on the demised premises. Suppose the landlord had a right to 10*l.* for rent, and goods to the value of 100*l.* had been fraudulently removed, the interest would have been the same as here.] *Cooper v. Monke* (e) shews that where the defendant justifies the taking of goods as a distress for rent *de injuriâ* cannot be replied. [*Stonor*. That is admitted, if they had been taken on the premises demised.] If this replication is good it would put in issue the land-


(a) Latch. 221.

(d) 3 B. & Ad. 2; S. C. in error, 1 C. & M. 500.

(b) 3 A. & E. 741—760; S. C. 5 N. & M. 14.

(e) Willes, 52.

(c) 1 C. & M. 505.


1840.  
  
 BOWLER  
 v.  
 NICHOLSON.

lord's interest in the rent, and the amount in arrear. [*Patteson* J. Interest in the land, in *Crogate's* case, appears to mean interest in the locus in quo.] The interest here relates to the subject-matter of the trespass. The replication is bad on three grounds; it is pleaded to a claim of right in land; to a claim of authority derived from the plaintiff; and to authority derived from the law. [Lord *Denman* C. J. How is the authority in this case to be distinguished from the authority instanced in the third resolution, "to view waste." [*Stonor*. The authority in this case is no more an authority derived from the complaining party, than it was in *Selby v. Bardons*(a). The authority intended was probably a licence to do the very act complained of in the declaration.]

LORD DENMAN C. J.—The first question is, whether the plea is good? I think it is a good plea, as the plaintiff has replied to it: it is not necessary to determine whether it would have been good on special demurrer. It follows closely the language of the statute, and is unobjectionable on general demurrer. The plea then being good, is the replication *de injuriâ* a proper replication? It appears to me to be a bad replication within the third resolution in *Crogate's* case. That resolution is, "that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. The same law of an authority given by the law; as to view waste." Mr. *Wightman* wished to establish that the defendants claimed an interest in these very goods, so as to make the replication faulty within the second resolution. It appears to me that this is not satisfactory, and they certainly had no interest in the house which was entered for the purpose of taking the goods. But the instance given by Lord *Coke* is sufficient to shew that the replication is bad within the

(a) 3 B. & Ad. 2; S. C. in error, 1 C. & M. 500.

third resolution. The words in the resolution, "the same law of an authority given by law," are certainly very general, and would include such an authority as *de injuriâ* may be replied to, according to *Selby v. Bardons*(a). But the preceding words, as to authority, "mediately or immediately derived from the plaintiff," and the instance "to view waste," are applicable to the present case. The authority "to view waste," is an authority given by the law to the landlord, and, as arising out of the relation of landlord and tenant, may be said to be derived from the tenant; and I am unable to distinguish between such an authority and the authority given by the statute to the landlord to follow his tenant's goods where fraudulently removed. I am of opinion, therefore, that the plea sets up the authority of the law within the meaning of the third resolution, and that this general form of replication is bad. If it were at all necessary to consider the question, I should think the most desirable form of replication to be that which discloses pointedly in what particular the plaintiff impugns the answer set up to his complaint.


1840.  
  
 BOWLER  
 v.  
 NICHOLSON.

LITTLEDALE J.—The first question to be considered is, whether the plea sufficiently sets out the demise. By 11 Geo. 2, c. 19, s. 22, the defendant may avow generally in replevin that the plaintiff enjoyed the land, whereon the distress was made, under a "demise, at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due, &c. without further setting forth &c. the demise or title of such landlord." That is equivalent to declaring that such an avowry would not have been sufficient before the statute. It appears to me that, according to the ordinary rules of pleading, it should have been shewn here how the demise arose, instead of stating it in this general way. Mr. *Wightman* defends the plea by saying that it pursues the language of the first section of the statute. But the statute merely gives a cer-

(a) 3 B. & Ad. 2; S. C. in error, 1 C. & M. 500.



1840.

  
 BOWLER  
 v.  
 NICHOLSON.

tain authority to the landlord under the circumstances there mentioned, and makes no provision whatever as to the form of pleading. I think this plea is in a form which ought not to be introduced, but it is not necessary to decide the point as it has not been taken on special demurrer. With regard to the general form of replication, it is admitted that it would not be proper within the second resolution in *Crogate's* case, if the plea had claimed any interest in the house itself in which the trespass was committed. But here it is said the case is the same as if it had been a common action of trespass for taking goods, as the house in question is not the house which was the subject of the demise stated in the plea. In this view the case certainly does not seem to be within the words of the second resolution. But let us see whether the third resolution does not apply, on the ground that the authority set up by the plea is derived mediately or immediately from the plaintiff. If such an authority is set up by the plea, it cannot be met by the general replication of *de injuriâ*. The statute gives the landlord authority to follow goods fraudulently removed for the purpose of avoiding a distress for rent. This appears to be the same kind of authority as to view waste. It may appear to partake somewhat of refinement to consider the authority relied upon in the plea as an authority derived from the plaintiff, but I think the plaintiff himself by entering into the contract with the landlord has impliedly authorised his landlord to follow and distrain goods fraudulently removed. Mr. *Stonor* says, that the authority contemplated by the resolution in *Crogate's* case is nothing more than a direct authority and licence in respect of the particular transaction complained of. But I do not concur in that construction.

PATTERSON J.—The objection to the plea must be treated as if taken on general demurrer. Whether the plea would have been good on special demurrer it is unnecessary to consider. The distinction between the forms of pleading

in replevin and trespass is, perhaps, no where more pointedly stated than in the following passage in the judgment of *Lee J.* in *Rogers v. Birkmire*(a), "There is a difference between an avowry and a justification in trespass, in respect to the strictness of setting out a title: because in an avowry a good title must be set out, but need not be so in a justification of a trespass; but then he must shew he is not a trespasser." I take it that the 11 Geo. 2 proceeded on the same distinction, because in that statute there is an express provision, which recites the difficulty of avowing in cases of distress for rent, and allows a general form to be used, but makes no allusion to the plea in trespass in such cases. Independently of any previous distinction between the pleadings in replevin and trespass the section which gives the general form of avowry in replevin is silent as to trespass, perhaps for this reason also, that by another section the general issue is made available in actions of trespass. However that may be, the distinction I refer to prevailed before the statute, and still prevails, between the pleadings in replevin and trespass, and we have to consider whether, by the present plea, the relation of landlord and tenant is sufficiently stated. Although the plea may be informal, and I dare say it will be found that in the precedents before the statute, (one of the last of which is that in *Rogers v. Birkmire*(a), which was decided in the 9 Geo. 2,) an express demise was part of the justification of rent in arrear, in actions of trespass, still I think that, on general demurrer, this plea must be held to set out the relation of landlord and tenant sufficiently. I do not rely so much on the plea following the language of the first section of the statute, as on the distinction prevailing between replevin and trespass.

The remaining question is, whether the replication is good. In respect to the objection, that the replication is bad, because the plea to which it is pleaded claims an interest in land and goods, it seems to me, as at present advised, that the second resolution in *Crogate's* case is con-

(a) *Lee's Cases temp. Hardw.* 245.

1840.



BOWLER

v.

NICHOLSON.

1840.

  
 BOWLER  
 v.  
 NICHOLSON.

fined to interest claimed in the particular land or goods which are the subject-matter of the action, as in *Jones v. Kitchin* (a), where the plea of *de injuriâ* was held bad to cognizance for rent in arrear, in respect of the land on which the distress was taken. So here, if the action had been for entering the land demised and taking the goods on that land, a plea setting up a tenancy between the parties in respect of that land, would have asserted a direct interest in the subject-matter of the action, within the meaning of the second resolution, and the replication *de injuriâ* would clearly be bad. But, where goods are distrained on other land, under the statute which authorises their seizure, in cases of fraudulent removal, I can see no distinction between a plea which justifies such a seizure, and the common plea in trespass, where the defendant justifies the taking of cattle because they were damage feasant on a close in his possession. There the general replication is held good, as the interest is claimed in a close, not the subject-matter of the action; and as to the goods, the interest there claimed is not being an interest antecedent to the seizure itself, according to the distinction laid down in *Selby v. Bardons* (b). So here interest is asserted in other land not the subject-matter of the action, and the case is precisely the same as if this action had been brought for taking the goods simply without stating the place in which they happened to be. The setting out, in this plea, that there had been a demise of certain lands, in which these goods were liable to be distrained, and that they had been fraudulently removed, all this is mere inducement, like the statement that the defendant was possessed of the close where the cattle taken were damage feasant. It seems to me, therefore, that there is no reason for saying that this replication is bad, as offending against the second resolution in *Crogate's* case.

Then we come to the objection that the replication is

(a) 1 B. & P. 76.

(b) 3 B. & Ad. 2; S. C. in error, 1 C. & M. 500.

bad because it is pleaded contrary to the third resolution in *Crogate's* case, as an answer to a plea setting up an authority in law. On this subject I entirely adhere to that which I said in *Selby v. Bardons* (a), which was supported by the court of error. What I there said was this, "It is certainly stated in the third resolution in *Crogate's* case, that the replication de injuriâ is bad when the plea justifies under an authority in law; but this, if taken in the full extent of the terms used, is quite inconsistent with part of the first resolution, which states that, where the plea justifies under the proceedings of a court not of record, the general replication may be used, or, where it justifies under a *capias* and warrant to sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record, and cannot be tried by a jury." I still so think, because the resolution states that, when the plea justifies under the proceedings of a court not of record, in which case the authority of law is just as much relied upon as where the proceedings are those of a court of record, the general replication may be employed. Therefore the authority given by law, mentioned in the third resolution, must be confined in the way it was understood in *Selby v. Bardons* (a), and as the Court of Exchequer also seems to have understood it in *Pigott v. Kemp* (b), to an authority in law derived mediately or immediately from the plaintiff. In the instance put of an authority to view waste it is not to be supposed that the authority intended is an authority given by the express licence of the party in possession of the land, but an authority given by law, and growing out of the relation in which certain parties stand to each other, as, for example, the tenant of a particular estate and the reversioner. So, here, the authority in law to distrain the goods in question, arises from the relation of landlord and tenant, created by the act of the plaintiff in becoming tenant, as much as by the act of the party who was his landlord. It seems to me,

1840.

~~~~~

BOWLER

v.

NICHOLSON.

(a) 3 B. &amp; Ad. 2; S. C. in error, 1 C. &amp; M. 500.

(b) 1 C. &amp; M. 197,

1840.

**BOWLER**  
v.  
**NICHOLSON.**

therefore, that the plea justifies, directly within the third resolution, under an authority in law, derived from the plaintiff himself, in which case the replication de injuriâ is too general, and a traverse of some particular fact is necessary. For these reasons, I think this a bad replication, and that the defendants are entitled to judgment.

**WILLIAMS J. concurred.**

**Judgment for the defendants.**



**The Mayor, Aldermen and Burgesses of MALDON**  
v. **WOOLVET.**

*Thursday,*  
*June 16th.*

Dredging for oyster spat in a common navigable river is illegal under 13 Ric. 2, stat. 1, c. 19.

Therefore where the declaration was in trespass quare clausum fregit; plea, that the locus in quo was part of a common navigable river, in which the public had a right to fish, and that defendant entered to fish for oyster spat; replication, that oyster spat was the spawn or young brood of oysters, unfit for the food of man; rejoinder, that the public had the right of fishing for oyster spat in a public river:—Held, ill on demurrer.

*Quære*, if the defendant had pleaded that he took the oyster spat for the purpose of bringing it to perfection?

**TRESPASS** for breaking and entering the plaintiffs' close, covered with water, called the River Blackwater, and tearing up and digging up divers large quantities of the soil of the said close, called culch, and carrying away and converting the same. The second count alleged a breaking and entering of the plaintiffs' several oyster fishery in the said river Blackwater, and fishing for oysters and oyster spat, and seizing and taking divers quantities of oysters and oyster spat, and converting the same.

Pleas: as to so much of the first count as relates to the breaking and entering the said close, and digging up the culch &c., that the place in which &c. was part of a public and common navigable river, in which every liege subject &c. had the liberty of fishing and dredging for oysters and oyster spat; wherefore the defendant, being &c., entered into the said place in which &c. to fish in the said river and to dredge for oysters, and at the said several times when &c., being seasonable times of the year for such fishing and dredging for oysters, and at the said several times

of man; rejoinder, that the public had the right of fishing for oyster spat in a public river:—Held, ill on demurrer.

did fish there by trawling, dredging and otherwise fishing for oysters and oyster spat, and then unavoidably a little damaged &c. and removed the earth and soil of the said close, and the said soil called culch, for the purpose of getting, taking and removing the oysters and oyster spat therefrom, and, when the said oysters and oyster spat had been got taken and removed from the said culch, replaced and left the same in the said part of the said river, doing no unnecessary damage &c. To the second count the defendant pleaded a similar plea, and justified the taking away and converting the oysters and oyster spat.

1840.  
The  
Mayor, &c. of  
MALDON  
v.  
WOOLVER.

Replication, admitting that the river Blackwater was a public navigable river, yet that the said part of the said river was within the boundaries of the borough of Maldon, and within the body of the county of Essex. Allegation, that oyster spat is the spawn or young brood of oysters cast by oysters, and not fully grown or formed into oysters, or fit for the use of man, and that the oyster spat in the plea mentioned was lying fixed and adhering to the said culch, to receive nourishment and grow to perfection, and so that the same could not be fished up without removing such culch. Verification. The replication to the second plea was similar, but alleged also that the plaintiffs were possessed of a certain close, part of the said river, and oyster spat was lying there, &c.

Rejoinder: that all the liege subjects &c. had of right the liberty and privilege of fishing and dredging for oyster spat &c., and of removing the earth and culch, so far as might be necessary for detaching the said oyster spat therefrom; wherefore &c. Similar rejoinder to the second replication.


General demurrer and joinder.

The case was argued in Michaelmas term last (a).

*Stephen Serjt.* in support of the demurrer. It may be

(a) Before Lord Denman C. J., Patteson, Williams and Coleridge Js.

1840.

  
 The  
 Mayor, &c. of  
 MALDON  
 v.  
 WOOLVET.

admitted that in arms of the sea and public navigable rivers the public have a right to catch fish, but even there a several fishery and right to exclude the public may exist; *Hale*, D. J. M. p. 1, c. 5 (a), *Lord Fitzwalter's case* (b), *Carter v. Murcot* (c); and such waters are not so far *publici juris* as to give a common law right of towing on the banks of rivers, *Ball v. Herbert* (d); or of using the sea shore for bathing, *Blundell v. Catterall* (e). The question now is, whether the common law right of taking fish extends to oysters, and at all events to oyster spat, which is not fit for the food of man, and which is attached to the soil where it is found. The question arose as to the right of taking shell fish on the shore of the sea, in *Bagott v. Orr* (f), but was not decided. In the Year Book, 12 *Hen.* 8, p. 9, the law as to property in things *feræ naturæ* is fully gone into, and it clearly appears that, whilst on the close of the plaintiffs, as the oyster spat was in this case, they had a property in it. An oyster bed on the close of an individual would seem *per se* to be a several fishery. But, even if oysters be fish to which the common law right extends, it has always been the policy of the law to prevent the capture of the spawn of fish. A series of statutes on the subject are collected in *Chitty's Game Laws*, 369 *et seq.* Thus the 13 *Ric.* 2, stat. 1, c. 19, prohibits the use of any nets or engines by which the fry or breed of any fish may be in anywise destroyed. So also the 3 *Jac.* 1, c. 12, imposes a penalty for taking the spawn or brood of any sea fish. [*Patteson J. Bridger v. Richardson* (g) is a decision upon that statute with respect to oyster spawn.] In that case, which is admitted to be good law, the oyster spat was taken up for the purpose of preservation, not of destruction; and the Court held that the statute did not apply to such a case. But the defendant has not brought himself within that case,

(a) Hargr. L. T. 18.

(b) 1 Mod. 105.

(c) 4 Burr. 2162.


(d) 3 T. R. 253.

(e) 5 B. &amp; Ald. 268.

(f) 2 B. &amp; P. 472.

(g) 2 Mau. &amp; S. 568.

for, if he relies on it, he ought to have pleaded that the spat was taken up for the purpose of preservation; whereas the right he claims is general. Then several acts contain express provisions for the protection of oyster spat, such as 9 *Ann.* c. 26, s. 2; 30 *Geo.* 2, c. 21, s. 2, and 31 *Geo.* 3, c. 51. The preamble of the last mentioned statute states that the maintenance of oyster fisheries is a great national object, and that the act is passed to prevent the destroying the oyster brood therein; which shews that no common law right of taking oyster spat can exist. He also cited 1 *Geo.* 1, st. 2, c. 18, 2 *Geo.* 2, c. 19, and 33 *Geo.* 2, c. 27. If, then, contrary to the policy of all these statutes, there are any circumstances under which the defendant would be justified in taking oyster spat, he ought to have pleaded them.

1840.  
  
 The  
 Mayor, &c. of  
 MALDON  
 v.  
 WOOLVET.

*Wightman* contra. A distinction is sought to be drawn between the common law right to take fish in public navigable rivers and to take oysters, and again between oysters and oyster spat; but no such distinction is to be found in the books. [*Patteson* J. You are arguing on the plea to the first count. The plea to the second count I cannot understand; for the plaintiffs claim a several fishery, and the defendant pleads that it is a common navigable river, in which the public have a right of fishing. Is that meant as a traverse of its being a several fishery?] It is the same plea as was pleaded in *Mayor of Orford v. Richardson* (a), and the plaintiff replied there an exclusive right by prescription. That decision, it is true, was reversed (b), but on a point which does not affect the character of the plea. It is sufficient, however, for the defendant to succeed on the first count, on which the question is, whether, where there is no several fishery, the defendant is justified in taking oysters and oyster spat in a public river. The right to take shell fish seems to stand exactly on the same foundation as

(a) 4 T. R. 437.

(b) 2 H. Bl. 182.



1840.

The  
Mayor, &c. of  
MALDON  
v.  
WOOLVET.

the right to catch floating fish: *Bagott v. Orr* (a). [Lord Denman C.J. There can be no doubt, I think, that oysters must be considered as fish: it is more questionable as to oyster spat.] No distinction has ever been drawn between them. Oyster spat may not be fit for food; but it may be useful for other purposes, whether to bring it to a state of perfection or otherwise; and it is not to be presumed that the defendant took it for an illegal purpose. Many statutes have been cited, but those relating to oysters all refer to several fisheries, or to oyster beds in the rivers Thames and Medway. It cannot be requisite that the defendant should have pleaded circumstances to exclude himself from their provisions; if he is to be brought within a penal statute, the case should have been made out by the plaintiffs' pleadings. [*Patteson* J. The defendant has to exclude a trespass; if he goes upon the soil of another, he should state circumstances to excuse it; and, therefore, if it is justifiable to take oyster spat for the purpose of preservation, he should have so pleaded.] The defendant relies on his common law right to catch fish: if there is any statutory provision to limit that right, it should have been shewn by the plaintiffs. But it has been held that taking oyster spat does not fall within the provisions of *Jac. 1*, which is an act to prevent the destruction only of the spawn of fish.


*Stephen Serjt.* in reply. Oyster spat is not fish. It stands in the same relation to oysters that an egg does to a fowl. Then the *Case of Swans* (b) shews that *ratione impotentiae* a species of property is acquired in oyster spat, when on the soil of the plaintiffs. *Bridger v. Richardson* (c) merely shews that oysters are not within the provisions of *Jac. 1*. But that statute is not relied upon further than to shew that it has long been the policy of the

(a) 2 B. &amp; P. 472.

(c) 2 Mau. &amp; S. 568.

(b) 7 Rep. 17 b.

legislature to protect the young of fish, and a series of statutes has been cited, protecting oyster spat in terms. Those acts negative any common law right to take oyster spat. It is argued that the plaintiff ought to have pleaded that the oyster spat was taken for purposes of destruction; and that might have been so if the defendant had been charged with taking fish generally; but the first count alleges a breaking of the plaintiffs' close. It lay therefore upon the defendant to plead a full justification of it. The statutes shew that taking spat generally is illegal, and the only exception is, where it has been taken for purposes of preservation; *Bridger v. Richardson* (a); but the defendant relies on the right to take generally, which would include the right to take for the purposes of destruction.

1840.  
  
 The  
 Mayor, &c. of  
 MALDON  
 v.  
 WOOLVET.

*Cur. adv. vult.*

LORD DENMAN C.J. now delivered the judgment of the Court (after stating the pleadings), as follows:—The preservation of the spawn, fry or brood of fish has been for centuries, since 13 Ric. 2, a favourite object of legislation, and the statutes passed for the purpose are extremely numerous. If the plaintiffs had in their declaration or replication averred that the oyster spat taken by the defendant was the spawn, fry or brood of fish, the defendant could not have defended himself by stating his immemorial right, as one of the subjects of this realm, to take them in the plaintiffs' close, being a navigable river. But the declaration stated that "oyster spat" was taken, and the plea justifies taking it under a public right of fishing. Still, however, the plaintiffs have alleged, and the defendant has not denied, that the oyster spat is the spawn or *young* brood of oysters; and, though that epithet rather applies to fish than spawn, and all the other circumstances in the description given in the replication are as consistent with the idea of

(a) 2 Mau. & S. 568.

1840.

~ ~  
The  
Mayor, &c. of  
MALDON  
v.  
WOOLVET.

fish as of spawn, yet it appears to us that the word spawn is sufficient. To remove it is unlawful within the statutes of *Ric. 2*, which have never been repealed, but frequently been recognized, and the immemorial usage cannot have legal existence.

Judgment for plaintiffs.

Tuesday,  
June 2d.

EVANS v. REES, Esq.

A magistrate has no right to issue a warrant for the apprehension of a person to attend to *find bail* for his appearance as a witness at the assizes, although it is sworn that the witness is material and has refused to obey a summons, which had previously issued, to give evidence before the magistrate.

*Quere*, whether a magistrate can, after a summons to give evidence before him has been disobeyed, issue a warrant to compel the witness's attendance.


**TRESPASS** for assault and false imprisonment. Pleas: 1. not guilty; 2. payment of money into Court.

The cause was tried before *Gurney B.*, at the Carmarthen spring assizes, 1838. The defendant, who was a magistrate, having taken the information on oath of the party complaining, in an assault case, and that the plaintiff was a material witness, issued a summons to him to appear and give evidence in the case before the defendant and other magistrates. The plaintiff not having attended the summons, a warrant was shortly afterwards issued against him by the defendant. The warrant recited that *A. B.* of &c. had made oath, before the defendant and other justices, that he had been assaulted, and that the plaintiff was a material witness; that the defendant had issued his summons &c. requiring the plaintiff to attend and give evidence; that it had been proved on oath that the summons was duly served, but that the plaintiff did not appear, and said he would not appear; and then proceeded as follows: "and whereas it is necessary, for the ends of justice, that the said &c. (the plaintiff) should appear at the next assizes, to be held &c., then and there to testify his knowledge concerning the said assault. These are to command you the said constables to bring the said &c. (the plaintiff) before me, or some other of her Majesty's justices &c., to *find sufficient bail*, and give his evidence at the next assizes

for &c., and testify his knowledge concerning the said assault." Under this warrant the plaintiff was taken before the defendant and other magistrates, and for this trespass the action was brought. The plaintiff then refused to give his evidence, unless he was paid for his time; defendant said plaintiff should be paid when the other witnesses were paid. Plaintiff persisted in his refusal to give evidence, and conducted himself with some violence, and was eventually, by the orders of the defendant, taken to prison. At the trial several objections were taken, on behalf of the plaintiff, to the warrant, but the most material was that the defendant had no power to issue the warrant for the purpose of holding the defendant to bail to give his evidence, and his lordship was in favour of this objection. Verdict for the plaintiff for 15*l.*, ultra the money paid into Court, with leave to the defendant to move to enter a nonsuit.

*Chillon*, in the following Easter term, having obtained a rule nisi,

*E. V. Williams* now shewed cause. The rule for a nonsuit cannot be made absolute, as money has been paid into Court. The question to be considered is, whether a magistrate has power to issue a warrant, after summons, to require the attendance of a person to give bail for his appearance as a witness. Justices out of sessions had no means whatever at common law of compelling the attendance of witnesses. The 1 & 2 *P. & M. c.* 13, and 2 & 3 *P. & M. c.* 10, required justices in cases of felony to bind witnesses over in their own recognizance to appear against the prisoner. Much that is stated in the "Justice" of *Lambard*, *Dalton* and *Crompton*, is erroneous. At the period when *Lambard* wrote it was considered proper strictly to examine the prisoner himself, and to go on with the examination of witnesses against him at any time after his commitment and before trial. No court of oyer and terminer can issue a warrant to secure the attendance of a witness; the utmost that the superior courts can do, is to

1840.  
  
 EVANS  
 v.  
 REES.

1840.

EVANS

v.

REES.

issue a subpoena ad testificandum, and to attach the party who disobeys it. In the Game Act, 1 & 2 *Will.* 4, c. 32, s. 40, justices are authorized to issue a summons requiring the attendance of a witness, yet if the summons is disobeyed they are not authorized to issue a warrant, but merely to impose a fine. There is an express authority upon the very question in 1 *Burn's Justice*, 1073 (a)—“justices have no power to issue a warrant to compel the attendance of a witness refusing to come and appear before them, to be examined preparatory to trial, however material the facts may be which such witness would prove:” Per *Garrow C.J.* and *Burton J.*, Chester spring assizes, 1816, MS. (He was then stopped.)

*Chilton and Evans* contrà. The warrant is good at all events, on the ground that the plaintiff had been guilty of a contempt. The refusal to attend and be bound over as a witness is a contempt, for which the magistrate may commit, “and this is virtually included within their commission, and by necessary consequences upon the statute of 1 & 2 *P. & M.* c. 13,” 2 *Hale*, P. C. 282. So, although 7 *Geo.* 4, c. 64 does not expressly authorize the magistrate, whether in felony or misdemeanor, to do more than bind witnesses by recognizance to appear, it does not follow that he may not exercise the authority incident to his office to deal with a recusant witness in such a way as to secure his appearance. [Lord *Denman C. J.* The defendant does not profess to commit for contempt.] The warrant substantially recites a contempt. It has been decided that a magistrate may commit a married woman, who refuses to appear at the sessions to give evidence, or to find sureties for her appearance; *Bennet v. Watson* (b); yet no other power seems to be given by statute than to make the witness enter into his own recognizance. As was said by Lord *Ellenborough C. J.* in that case, “The law intended that the witness should be forthcoming at all events, and it is a

(a) By D'Oyly and Williams.

(b) 3 *Mau. & S.* 1.

lenient mode, which the statute provided, to permit the witness to go at large upon his own recognizance. However, that is only one mode of accomplishing the end, which is the due appearance of the witness; therefore where that mode, as well as the end, is frustrated, as far as it can be, by the witness's refusal, it seems but reasonable that the justice should be warranted in committing, which is the only means left of securing the end." It seems, therefore, that the magistrate has a right to do all that is necessary to secure the end according to the particular circumstances of the case.

1840.

EVANS  
v.  
REES.

LORD DENMAN C. J.—This warrant would have the effect of keeping the witness out of the way, for he might think it would be useless for him to attend unless he could "find sufficient bail." In the third volume of *Burn's Justice*, 207 (a), there is a note of a case, in which *Graham B.*, in his address to the grand jury, censures the practice of committing witnesses in default of sureties, as a general practice, though he says that in some cases it may be justified. I do not mean to throw any doubt on the power of magistrates to do whatever may be necessary to secure the future attendance of a witness, whether in cases of felony or misdemeanor. If the warrant had recited that it had been proved that the plaintiff was a material witness and had refused to attend, and had then gone on simply to require his attendance to give information, I think the warrant would have been good. But here it is taken from the statement of the complaining party that the plaintiff is a material witness, and the warrant then goes on to call upon him to attend and find sufficient bail for his appearance at the assizes. The warrant, at all events, goes too far, and farther than in *Bennet v. Watson* (b), where the party committed for want of sureties had manifested, in the presence of the committing magistrate, her determination not to give evidence.

(a) By D'Oyly and Williams.

(b) 3 Mau. &amp; S. 1.

1840.

EVANS  
v.  
REES.

LITLEDALE J.—I am of the same opinion. I pronounce no opinion on the question, whether a magistrate can issue his warrant against a person who disobeys the summons to appear before the magistrate and give evidence. But I think the defendant had at all events no power to issue his warrant for apprehending the plaintiff, that he might be brought up to find bail for his attendance at the trial.

PATTESON J. concurred.

WILLIAMS J.—I should be sorry, and do not think it at all necessary, to impeach the authority of *Bennet v. Watson* (a). Here the magistrate, at all events, anticipated the case. Before requiring bail, he should have had the witness before him, and ascertained on his own personal knowledge that the witness refused to give evidence at the trial.

Rule discharged.

(a) 3 Mau. & S. 1.

Thursday,  
June 11th.

EVANS v. REES.

The power of the Court to enter up judgment nunc pro tunc does not depend in any way upon 17 *Car. 2*, c. 8, but exists at common law,

SIR W. W. FOLLETT, in Hilary term last (Jan. 11), had obtained a rule to shew cause why the defendant should not be at liberty to enter the judgment in this cause nunc pro tunc.

This was an action of replevin; the trial lasted four days at the Brecon spring assizes, 1839, and several points of law were exercised although the death of a party take place before the term ensuing the verdict, and although also more than two terms intervene between verdict and judgment, if the delay be not that of the party seeking to enter up judgment.

The defendant, who had obtained a verdict at the spring assizes, died before the first day of Easter term. In that term the plaintiff moved for a new trial, and the rule was refused on the last day of the term. The trial of the cause had lasted four days, and the costs were so heavy that the taxation was not complete, nor was judgment signed, until after Trinity term. In Michaelmas term following notice was given of the allowance of a writ of error, on the ground that judgment had not been signed within two terms after verdict. In Hilary term application was made for judgment nunc pro tunc, and was granted, the Court considering the defendant's representatives free from laches.

law (a) were raised in the course of it. The defendant obtained a verdict. The defendant died the 3rd of April, before the commencement of the following Easter term. In that term a motion was made on behalf of the plaintiff for a new trial; the Court took time to consider, and refused a rule on the last day of the term. Judgment was signed on the 24th June. On the following day a summons was taken out to set aside the judgment for irregularity, but no order was made. On the 4th November last a writ of scire facias, returnable on the 20th of the same month, was sued out to revive the judgment, and, on the 19th, notice of the allowance of a writ of error was served, stating the ground of error to be that the defendant had died after verdict and before judgment, and that the judgment was not entered within two terms after such verdict. The affidavits in support of the rule stated that the bill of costs consisted of fifty sides, that the bill could not be prepared for taxation before the end of Trinity term; that afterwards the master declined to proceed with the taxation in consequence of the summons that had been taken out to set aside the judgment; that, after the summons was discharged, several attendances before the master became necessary, and that his allocatur was not obtained till the 12th July, when the entry of the judgment was completed by inserting therein the amount of the master's allocatur.

*Evans* and *E. V. Williams* now shewed cause. The object of this rule is to defeat the writ of error which has been allowed; and the rule cannot be made absolute unless the defendant bring himself within the 17 *Car. 2*, c. 8, s. 1, which provides that the death of either party between the verdict and judgment, shall not be alleged for error, "so as such judgment be entered within two terms after such verdict." Unless judgment in such a case is entered up within two terms after the verdict, the Court cannot permit it to be entered up afterwards nunc pro tunc; *Copley v.*

1840.

EVANS  
v.  
REES.

(a) See the case, 2 P. & D. 626.



1840.

EVANS  
v.  
REES.

*Day* (a), *Rhodes v. Haigh* (b), and *Lawrence v. Hodgson* (c); and the practice is not altered by rule 3 of Hilary term, 4 Will. 4: *Lanman v. Lord Audley* (d). The practice, indeed, has been so far relaxed, that the Court has allowed the judgment to be entered up, even after the lapse of the two terms, where the Court itself, under peculiar circumstances, has been the cause of the delay. Thus in *Key v. Sherwin* (e), the defendant had a verdict in December, 1829, and in the following term the plaintiff obtained a rule nisi for a new trial, which stood over for a long period by the act of the Court. The defendant died in November, 1830. The Court, after a lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up nunc pro tunc. The delay, however, must be entirely the delay of the Court, and the party himself must be free from all laches. Thus in *Vaughan v. Wilson* (f), *Tindal* C. J. observed, "in *Lawrence v. Hodgson* (c) it was expressly decided that the Court will not interfere where the delay arises from the act of the party. Here the agreement was, that judgment should be entered by the plaintiff on 6th June. It was not entered on the 6th, 7th, or 8th, and then the defendant died; and the plaintiff now calls on us to say that we have power to order it to be entered up nunc pro tunc, as of the 6th June, with a stay of execution till the 13th. But it is to be observed that in the interval, which the plaintiff allowed to elapse, the distribution of the defendant's assets was altered by operation of law, and there having been laches on the plaintiff with reference to the conflicting rights of other parties, the Court has no authority to enter up judgment nunc pro tunc." In *Doe d. Taylor v. Crisp* (g) also, where a verdict was found subject to a special case at the summer assizes, 1835, and the

(a) 4 Taunt. 702.

(b) 3 D. &amp; R. 608.

(c) 1 Y. &amp; J. 368.

(d) 2 M. &amp; W. 535.

(e) 1 M. &amp; Scott, 620.

(f) 4 Bing. N. C. 116; S. C. 5 Scott, 404.

(g) 7 Dowl. P. C. 584.

case was not settled and set down for argument until Michaelmas term, 1836, one of the parties having died in February, 1836, the Court refused to let judgment be entered up nunc pro tunc. In *Blewett v. Tregonning* (a) the plaintiff obtained a verdict at the spring assizes, 1834, and a rule nisi for a new trial was obtained in the following term, the plaintiff died in March, 1835, and in Trinity term, 1835, the rule was discharged. In Easter term, 1836, the Court ordered judgment to be entered up nunc pro tunc, though more than two terms had elapsed since the discharge of the rule, on the ground that it appeared that the delay was occasioned by the taxation of costs, and that no dilatoriness could be imputed to the plaintiff. But it is to be observed that not a single authority was cited in that case; and that in that as well as the other cases which may be relied on in support of the present rule, the party was alive *in the term* of which it was sought to enter judgment, whereas here the party died before the first day of the term following the verdict, the suit has abated, and the Court has no power to enter up judgment.

In this case the delay has not been occasioned by the act of the Court. Although the rule for a new trial was not disposed of until the last day of Easter term, it does not appear from the affidavits that the defendant's agents *knew* of the pendency of the rule, and, if they did, they might, notwithstanding, have made preparations for taxing costs. The whole of Trinity term, too, is suffered to elapse, during which judgment might have been signed without waiting for the taxation, for it is enough to sign judgment under the provisions of 17 Car. 2, c. 8, it need not be formally entered up: *Helie v. Baker* (b): and the present rule should have been moved for in Michaelmas term, as soon as the defendant's agents had notice of the writ of error.

Sir W. W. Follett and Chilton contra. The result of the authorities is clear, that the Court will allow judgment

(a) 4 A. &amp; E. 1002.

(b) 1 Sid. 385.

1840.

EVANS  
v.  
REES.

to be entered up more than two terms after the verdict in cases of this sort, if the delay has been occasioned by the act of the Court, and that it will not do so if the delay has been that of the party himself. Sometimes the Court has hesitated to grant the indulgence, lest the estate of the deceased should be prejudiced, but here the application is *on behalf* of the estate. In *Green v. Cobden* (a), authorities were cited against the application, yet the Court ordered judgment to be entered up, although a much longer delay might have been imputed to the party than in this case. It would have been improper by preparing for the taxation of costs to have incurred an expense which might be useless; and an application for judgment *de bene esse* would have been without precedent. It might have been equally said in *Blewett v. Tregonning* (b) that the party should have prepared by anticipation for the taxation of costs. It might also have been objected there, as here, that the party entitled to judgment did not depose that he knew of the rule questioning his title to judgment. In a cause like the present, which lasted four days, and gave rise to frequent discussion of points of law, the defendant's agents must have expected there would be a motion for a new trial; it must be assumed that the pendency of the rule was known to them.

*Cur. adv. vult.*

LORD DENMAN C. J. on a subsequent day in this term (June), delivered the judgment of the Court (c).—This was a motion to enter up judgment *nunc pro tunc*, made by the executors of a defendant in replevin. The cause was tried at the spring assizes 1839, and the defendant obtained a verdict. The defendant died on the 3d April before the ensuing Easter term. Within the first four days of that

(a) 4 Scott, 486.

(b) 4 A. & E. 1002.

(c) Lord Denman, C. J., *Little-  
dale, Patterson, and Williams* Js.

term the plaintiff moved for a new trial. The Court took time to consider the question, and on the 8th May (the last day of the term) refused a rule. Judgment was entered up on the 24th June, twelve days after the end of Trinity term. The taxation of costs was not completed until the 6th July. An application was then made at chambers to set aside the judgment, which was dismissed. On the 19th November a writ of error was served by the plaintiff. On the 11th January, 1840, the present motion was made.

1840.

EVANS  
v.  
REES.

On the argument it was contended that the Court had no power to grant the rule, because the party died between the verdict and the first day of the term, which makes it necessary to refer to the statute 17 *Car. 2*, for, if the judgment be entered as of the first day of Easter term, 1839, it will still be after the death of the party, whereas in all the cases in which the Court has directed judgment to be entered *nunc pro tunc*, the party had died *after* the first day of the term ensuing the verdict, and so the Court by ordering the judgment to be entered as of the first day of the term has made it good at common law, being *before* the death of the party. But there is no ground for this distinction. The power of the Court to enter judgment *nunc pro tunc* does not in any respect depend upon the statute 17 *Car. 2*. It is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of Court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. The effect of the judgment when entered may depend on the statute 17 *Car. 2*, but the power to enter it does not.

The proviso in Rule 3 of Hilary term, 4 *Will. 4*, has made no difference; it merely preserves the power of the Court or a judge, notwithstanding the direction that judgments shall in general take effect from the actual time of entry.

The question in the present case is therefore reduced

1840.

EVANS

v.

REES.

to this, whether the delay was occasioned by the act of the Court, or by the laches of the party. Now it is clear that the party was prevented by the act of the Court from entering up judgment during the whole of Easter term, 1839, that is, until the 8th of May. During the interval between that day and the 12th of June (the last day of Trinity term), judgment might have been entered up without any leave of the Court, and would have been good under the statute 17 *Car.* 2. There was nothing whatever to prevent the party from taxing costs and entering up judgment in that interval. But it appears that the case was one of great length and intricacy, and required a longer time to prepare the necessary materials and to complete the taxation. It is not directly sworn, but we think it fair to assume that the parties now applying were aware that the Court were deliberating as to the granting a rule for a new trial until the last day of Easter term; and, if so, they were justified in taking no steps to prepare for taxation of costs, which might have incurred fruitless expense, prior to the 8th of May, and, as already stated, the interval between that day and the 12th of June appears to have been too short. We think, therefore, that no laches can fairly be imputed to them in not having signed their judgment before the time when they did actually sign it. Neither was there any laches in not applying for the present rule until Hilary term, 1840, for they had no reason to suppose that such an application was necessary until they were served with the writ of error, which was very late in Michaelmas term.

The rule therefore must be made absolute.

Rule absolute.



1840.

## WHITE v. TEALE.

Monday,  
June 15th.

**TROVER** for a box of clothes. Plea: not guilty. On the trial of the cause before Lord *Denman* C. J., at the London sittings after Trinity term, 1838, the plaintiff gave evidence of a demand and refusal. The defendant offered to prove that the goods were placed in his custody by the plaintiff (who had been his lodger), to be kept till payment of rent, which never had been paid. His lordship refused the evidence, thinking it inadmissible under "not guilty." Verdict for the plaintiff, subject to a motion to enter the verdict for the defendant.

Evidence of  
lien is not ad-  
missible under  
the general  
issue in trover.

*Platt*, in the following Michaelmas term, having obtained a rule nisi,

*Kelly* and *Bagley* shewed cause (a). The question is, whether the defendant could give evidence of an agreement in the nature of a lien under the general issue. The plea of not guilty denies nothing but the mere fact of conversion, and admits the inducement in the declaration "that the plaintiff was lawfully possessed," that is, that at the time of the conversion he had the right of immediate possession, which is a necessary part of his title to enable him to maintain trover, according to *Gordon v. Harper* (b). The claim of lien by the defendant for rent is inconsistent with the plaintiff's right of immediate possession, and therefore controverts the very right which has been admitted by the plea. The proper plea to let in evidence of lien would be a special plea, denying the plaintiff's possession as of his own property at the time when &c.; *Owen v. Knight* (c), and *Scarfe v. Morgan* (d); and it would confuse the rules of pleading to allow the same evidence under the general issue. In

(a) Easter term last, (May 7),  
before Lord *Denman* C. J., *Little-  
dale*, *Patteson* and *Coleridge* Js.

(b) 7 T. R. 9.  
(c) 4 Bing. N. C. 54.  
(d) 4 M. & W. 270.

1840.  
 ~~~~~  
 WHITE  
 v.  
 TEALE.

conformity with the language of the new rules of pleading, it was decided in *Frankum v. Earl of Falmouth* (a) that, in case for wrongful diversion of water, "not guilty" puts in issue the mere *fact* of the diversion and not its wrongful character. That authority was recognized in *Stancliffe v. Hardwick* (b), where the present question is thus alluded to, "a doubt may however arise as to the proper course to be pursued, where the defendant has a lien on goods, and there has been only a refusal to deliver on demand," but the point is expressly left undecided. But *Barton v. Brown* (c) has decided that the defendant cannot set up absolute property in himself, although the only evidence of a conversion is demand and refusal. If then the defendant cannot set up absolute property under such a plea, why should he be allowed to set up a temporary property, such as lien? In either case the objection is equally good that the defendant seeks by his evidence to dispute that which he has already admitted by his plea, viz. the plaintiff's right of immediate possession at the time when &c., which is the only sort of property that is material to sustain trover.

*Platt* contrà, admitted the authority of the cases cited, and that the evidence would have been inadmissible if there had been an actual conversion, but contended that, as there was no such conversion in this case, the evidence should have been received, to shew that the equivocal act of refusal by the defendant, on demand, did not amount to a conversion. For this distinction he relied on the dictum in *Stancliffe v. Hardwick* (b).

*Cur. adv. vult.*

LORD DENMAN C. J. (after stating the case) now delivered the following judgment of the Court.—The Court are of opinion that the evidence was not admissible under the

(a) 4 N. & M. 330.

(c) 5 M. & W. 298.

(b) 2 C., M. & R. 1—11.

1840.

WHITE  
v.  
TEALE.

plea of not guilty. That plea, by the new rules, denies only the conversion, and admits the title of the plaintiff. Now that title consists of the right of property and the right of possession at the time of the alleged conversion; *Gordon v. Harper* (a); but a lien is inconsistent with and negatives the plaintiff's right of possession. If, therefore, proof of it were admitted under the plea of not guilty, the defendant would be allowed to give in evidence at the trial a negation of that matter which he has by his plea admitted on the record. He ought to have traversed that the plaintiff was possessed, as of his own property, in manner and form as alleged in the declaration, and then he would have put in issue the plaintiff's right of possession, as was holden in *Owen v. Knight* (b), and would have been entitled to prove the lien in order to negative that issue. The case of *Stancliffe v. Hardwick* (c) was cited, in which the Court of Exchequer in giving judgment guard against being supposed to decide that a lien might not be given in evidence under a plea of not guilty, in order to answer a case of demand and refusal proved by the plaintiff as evidence of a conversion. The Court did not then decide that a lien might be given in evidence under the plea of not guilty, but used the expressions alluded to solely for the purpose of leaving that question entirely open. Other matters were touched in the argument, on which we need not now remark. The rule must be discharged.

Rule discharged.

(a) 7 T. R. 9.

(c) 2 C., M. & R. 1—11.

(b) 4 Bing. N. C. 54.





1840.

Tuesday,  
June 16th.

The QUEEN v. The EASTERN COUNTIES RAILWAY  
COMPANY.

Where the Court had made a rule absolute for a mandamus to a railway company to proceed to complete their line according to their act of parliament, on affidavits by which it appeared that the Company had no intention to proceed with their works, and the writ, which issued in consequence recited that the Company had purchased lands from L. to C., but had made no provision for executing the line from C. to Y.; and that C. S. was the owner of land between C. and Y., through which the line in the plan of the Company passed, and that he had required the Company to

set out the line

and to proceed to complete the railway from C. to Y., but the Company refused to purchase the lands necessary &c. or to set out and complete the said line, and thereupon commanded the Company to complete the railway &c.:—Held, that the writ was ill, as it contained no averment that the Company had given up their design, or that they were not effecting it with all convenient speed, and the Court could make no inference to that effect.

**MANDAMUS.** The writ in this case (*a*) set out the different acts (*b*) under which the Company is formed, and recited, that in pursuance thereof the Company had purchased lands for the use of the said undertaking, and had begun to make, and in part had completed, the said railway between London and Colchester, in the county of Essex, but that they had not made any sufficient provision for setting out, executing, or working the line of the railway beyond Colchester, or in the counties of Norfolk and Suffolk, and “whereas we have been informed &c., that one *Charles Symonds*, of the town of Great Yarmouth, in the county of Norfolk, esquire, is the owner of a certain farm &c., situate in the parish of Wetheringsett, in the county of Norfolk, which are described in the schedule to the first mentioned act, and through which said farm the centre line of the railway, as laid down in the plans thereof, referred to in the said first mentioned act, runs, and that he, the said *Symonds*, has required you the said Eastern Counties Railway Company to set out and define the line of the said railway, deviating from the line laid down in the plans in the last mentioned act, in that behalf referred to, and to proceed to make and complete the said railway from London to Norwich and Yarmouth, yet you, well knowing &c., have absolutely refused and neglected, and still do refuse and neglect to purchase the lands necessary to

(*a*) See *Reg. v. Eastern Counties Railway*, 2 P. & D. 648,

(*b*) 6 & 7 Will. 4, c. cvi. (local

and personal); 1 & 2 Vict. lxxxii. (local and personal).

the making and completing the said railway and lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, or to set out and define the line of the said railway, deviating as aforesaid, or to make and complete the said railway according to the provisions of the said acts, in contempt &c.” The writ then commanded the Company to make and complete a railway from London to Norwich and Yarmouth, “ and especially that you set out and define the line of the said railway, particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth, deviating from the line laid down in the plan &c., and that you proceed to purchase the lands necessary to the making and completing the said railway” &c.

The return stated that *Symonds* had not required the Company to set out and define the line of the said railway, deviating from the line laid down in the plans &c., and to proceed to make and complete the said railway &c.

That the Company had set out and defined the line, particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth, deviating &c.

That the Company had, from the time of the said act in the writ first mentioned, hitherto exercised a reasonable discretion, option and judgment in making and completing the said railway, and in compulsorily requiring, taking &c. lands under the said acts; and that, in exercise of such reasonable discretion &c., they had proceeded to make, and had made certain portions of the railway, and had purchased all the land necessary to making the railway between London and Colchester, as also a large portion of the lands which are necessary &c. between Colchester and Norwich, and Norwich and Yarmouth, “ which said last mentioned lands are all of the lands so lying between Colchester and Norwich, and Norwich and Yarmouth, which we, the said Company, in the exercise of such reasonable discretion &c. as aforesaid, and in execution of the powers of the said acts &c., have deemed expedient and proper to purchase before the issuing of the said writ.

1840.

The QUEEN  
v.  
The EASTERN  
COUNTIES  
RAILWAY  
COMPANY.

1840.

The QUEEN  
v.  
The EASTERN  
COUNTIES  
RAILWAY  
COMPANY.

That by virtue of the said acts divers subscriptions and sums of money had been received and advanced to and for the benefit of the said Company, to the amount of 953,045*l.* and that the Company had partly laid out and expended the said sum of money in paying for the expenses of the acts, and partly in purchasing a large portion of the lands necessary for the said railway, and that the residue of this sum amounted to 9892*l.*, now remaining in the hands of the said Company undisposed of, and ready to be laid out and expended in making and maintaining the said railway, and in otherwise carrying the said acts into execution, “ which said last mentioned sum, together with the residue of the monies which we are by the said acts empowered and authorized to raise, borrow &c., for the purpose of making and completing the said railway, is wholly inadequate and insufficient for the purchase of the lands necessary for the making and completing of the said railway in the said writ mentioned, and for these reasons and causes we, the said Company, have not proceeded to make and complete a railway from &c.

A concilium having been obtained, the case was set down in the crown paper, and was argued by Sir *J. Campbell* A. G, and *Cresswell* for the crown, and by Sir *W. W. Follett* for the defendants on a former day in this term (*a*).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court:—In this case the Court granted a mandamus to complete the works which the Company had undertaken to execute by virtue of the powers entrusted to them by an act of parliament; a return was made, the sufficiency of which being questioned, it was set down for argument, and

(*a*) June 10th, before Lord *Denman* C. J., *Littledale*, *Patteson* and *Williams*, Js. As the judgment of the Court proceeds upon

the insufficiency of the writ, it has been deemed unnecessary to give the arguments of counsel on the return.

has been very fully discussed before us. The defendants, however, denied that the writ of mandamus itself was legal, and on that preliminary point it is therefore needful that we should first form our opinion. We were told that our power to issue a writ of mandamus in any such case is at least doubtful, and were properly reminded that the form and method of proceeding may prevent our judgment from being revised by any Court of error, a consideration which certainly ought to induce great caution in assuming jurisdiction, but cannot justify us in declining it, where the law has lodged it with the Court. We have no more right to refuse to any of the Queen's subjects the redress which we are empowered to administer, than to enforce against them such powers as the constitution has not confided to us. It was urged that, our mandamus to compel obedience to an act of parliament implying a disobedience at present, the prosecutor may indict, and having that remedy does not require the extraordinary process of mandamus. This argument appears to prove too much, as it would prevent the Court from acting in all cases where an act of parliament is contravened; besides, the indictment does not compel the performance, but only punishes the neglect of duty, though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the parties into contempt and expose them to attachment, which would but end in individual suffering, and leave the required act still undone; yet we are not in the habit of supposing that persons required to obey the Queen's writs, issuing from this Court, will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law. Objections were also raised to mandamus for insuring the execution of these works: under this head it was in effect insinuated that similar acts of parliament entail no duties whatever on those who may procure them; that they do but offer a boon which the projected company may accept or reject, or partially accept and partially reject, at their sole will and pleasure: the

1840.

The QUEEN  
v.  
The EASTERN  
COUNTIES  
RAILWAY  
COMPANY.

1840.

  
The QUEEN  
v.  
The EASTERN  
COUNTIES  
RAILWAY  
COMPANY.

assertion, appearing in them all, that the means of executing the intended works have been provided, was treated as no proof, even *prima facie*, that they have sufficient funds for that purpose: the provision for disabling the company from taking land after the lapse of a certain term, was put forth as a proof that they had full power to proceed with their works or abandon them, without any regard to the interest of others. Some decisions of the Court of Chancery, which have enjoined companies not to take possession of certain lands peculiarly circumstanced, were called inconsistent with any power in this Court to require that possession should be taken of lands under circumstances entirely different. We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce. When we made the rule absolute we expressed our conviction that the case was in some respects new, and that its circumstances admitted of some doubt whether our power ought to be applied to them. We shall keep our minds open for the discussion of all such doubts on every proper occasion, but we do not yield to them, nor is it necessary to advert to them in coming to our present decision. We neither hold the Court incompetent to enforce execution of an act, under the circumstances disclosed to us in the affidavits, nor think any of the reasons which we have enumerated are conclusive against making our mandamus peremptory. Those points will be as much open to argument hereafter as they were when the rule was obtained. But it will be perceived, on adverting to what was said on the former occasion, that we considered the facts then stated to afford strong evidence that the Company, having obtained an act for a particular purpose, had stopped short of effecting it, and satisfied themselves with doing less than one half of what they had undertaken to do, and represented themselves to be capable of doing. It was by that undertaking and representation that they obtained the act, and the great powers of occupying land and raising money, which

it bestowed. We could not recognize their right to say to those who had contracted with them and to the public—“our undertaking does not bind us, because our statements were untrue; we have nothing to consider but the pecuniary interests of the Company, and claim to exercise an unlimited option over these works, and every part of them.”

The rule was made absolute and the writ was directed to go, on the supposition that they had no intention to proceed *bonâ fide* with their works, and had, on the contrary, abandoned all intention to complete them. But the prosecutors of the writ have stated no such facts. Their statements may raise a suspicion on the subject, but fall far short of proof. The acts are recited in the inducement to the writ, especially the power to vary their line within a given time, or that otherwise they must abide by the line laid down in the plans. The writ proceeds to allege that *Charles Symonds* is the owner of lands near Yarmouth, enumerated in the schedule, and has required the Company to set out and define the line of the railway deviating from that in the plans, and to proceed to make and complete the railway to Norwich and Yarmouth, “yet you, well knowing the premises, but not regarding your duty in that behalf, have absolutely refused and neglected, and still do refuse and neglect to purchase *the lands* necessary to the making and completing the same railway, and lying between Colchester and Norwich, and between Norwich and Yarmouth, or to set out and define the line deviating as aforesaid, and afterwards to complete the whole road; to set out the deviated line especially, and to purchase the lands necessary for that purpose.” Here is no averment that the Company have given up their design or have wilfully exercised any injurious option, or that they are not effecting it with all convenient speed, or that even a reasonable time has elapsed, in the opinion of the prosecutors, without due preparation being made, or that it would not be more advantageous to all concerned to abide by the original line than set out and define a different one. The gravamen rests in the simple

1840.

The QUEEN  
v.  
The EASTERN  
COUNTIES  
RAILWAY  
COMPANY.

1840.

*The QUEEN*  
v.  
*The EASTERN*  
*COUNTIES*  
*RAILWAY*  
*COMPANY.*

form of a complaint, that the Company has refused to purchase lands at the time when Mr. *Symonds* required them to do so. There is no inconsistency between this and the possible fact of their having done all that prudence authorized to obtain such lands at equitable prices, and refused to purchase because fair bargains could not be obtained. We can infer no fault ; it must be distinctly charged, and the charge as it stands is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides.

Judgment for the defendants.

*The QUEEN v. The Rev. Dr. D'OYLY and others.*

*The QUEEN v. HEDGER, Esq. and others.*

*Monday,*  
*June 1st.*

The rector of a parish has the right to preside at a vestry held for the election of churchwardens, and also, as president of such meeting, to grant a poll, if demanded, and to fix the time and place of taking it.

*SIR F. POLLOCK*, in Easter term last, obtained a rule calling upon Dr. *D'Oyly*, as rector, and the other defendants, as churchwardens, of the parish of St. Mary, Lambeth, Surrey, to shew cause why a writ of mandamus should not issue, commanding them to convene a vestry for the purpose of electing churchwardens of the said parish.

The affidavits, on which the rule was obtained, contained the following statements:—That the parish has four churchwardens. That on Sunday, the 11th April, 1840, notice was published, and signed by one of the churchwardens and one of the overseers, that a vestry would be held at the Boys' School Room, on the 21st April, at 11 o'clock A.M., for the election of churchwardens, and for the nomination of overseers &c., and for other purposes. That on the same 11th April there appeared the following notice, signed by Dr. *D'Oyly*:—"Notice is hereby given, that if at the annual vestry for the election of parish officers, and other business, which will be held in the Boys' School Room, Lambeth Green, on Easter Tuesday next, at 11 o'clock in the fore-

noon, any poll or polls should be demanded and granted, the same will, for the convenience and security of the inhabitants and other persons entitled to vote, be deferred to the end of the other business, and will be opened and proceeded with at the usual place of polling, at the porches of the parish church of St. Mary, immediately after the close of such other business, till 5 o'clock of that day, and will be continued for three successive days, from 8 o'clock in the forenoon till 5 o'clock in the afternoon, and will finally close at 5 o'clock in the afternoon of the last day of polling. The rate-payers entitled to vote are requested to bring with them the receipts for the payment of the last poor-rate paid by them." That the church porches, in bad weather, having been found an inconvenient polling place, a majority of the churchwardens wrote to Dr. *D'Oyly*, requesting that the poll should take place at the Boys' School Room, and giving notice that it would be prepared for the purpose. That on the 19th April, the following notice was published, and signed by three of the churchwardens and four overseers of the parish:—" Notice is hereby given, that several inhabitant rate-payers having objected to the poll (if demanded and lawfully granted) being taken at the church porches, and we the overseers and churchwardens being of opinion that any poll of the vestry may be taken with more convenience to the voters and with more propriety at the school room, or some other convenient place, do give notice that we shall make arrangements to take the poll at the school room, and shall propose to take the sense of the vestry as to the most convenient and proper place for taking the poll." On the following day the three churchwardens, who signed the above notice, received a letter from Dr. *D'Oyly*, expressive of his determination to take the poll at the porches of the church, as being the most convenient place. That the vestry was held on the 21st April, at the school room, pursuant to the notice, when the deponents attended. That the rector attended and took the chair. That after the rector had appointed his churchwarden, according to the

1840.

~  
The QUEEN  
v.  
D'OYLY.



1840.  
  
 The QUEEN  
 v.  
 D'ORLY.

custom of the parish, three persons, of the name of *Fall*, *Barton*, and *Hunt*, were proposed and seconded as church-wardens by one party, and three others, *Evans*, *Grissell* and *Bright*, by another party. That a shew of hands was taken by the rector, who declared it to be in favour of the first three. That certain rate-payers then handed to the rector a written demand of a poll on behalf of the other three. That deponents thereupon protested against the rector taking upon himself to make any grant of the poll and regulating the manner of holding the same without the intervention of the vestry, and that the rector stated that he should take upon himself to grant a poll in accordance with the notice published by him. That the rector did accordingly grant a poll in conformity with his own notice. That two of the deponents protested against this course, and requested that the sense of the vestry should be taken, and handed to the rector a paper containing the terms of a motion, that the poll should be taken at the school room, to commence at 9 each morning. That the rector refused to put the motion. That the vestry then proceeded to the nomination of overseers and other business, at the close of which, it being then 7 o'clock, the rector announced that the poll would not commence till the following morning.

That it did not appear that the rector had ever taken upon himself the exclusive regulation of the poll, except in two instances, the first in 1832, and that on both occasions his right to do so had been protested against. That the poll was taken as directed by the rector, and that some of the deponents protested against it both at its commencement and at its close.

The affidavits in answer stated, that there were then 10,000 rate-payers in the parish, of whom a very small portion only could be accommodated in the school; that the school had been tried and found inconvenient; that the polls had almost invariably been taken at the porches of the church; that *Evans*, *Grissell* and *Bright*, had a very large majority on the poll; that all the applicants for the rule,

except one, who was not a rate-payer, had polled at the election.

1840.

The QUEEN  
v.  
D'OYLY.

Sir *J. Campbell* A. G., *Thesiger* and *Swann*, shewed cause (a). The circumstance that all the applicants for this rule, who were voters, took part and acquiesced in the election is of itself a sufficient ground for discharging the rule. It appears also that the rector adjourned the poll to the most convenient place, and that 8 o'clock in the morning was fixed upon to enable persons, who chose, to vote before proceeding to their own private business; that *Grissell* and his party had a large majority; and it does not appear that the mode of conducting the poll excluded any voter. *Campbell v. Maund* (b), and *Reg. v. St. Mary, Lambeth* (c), may be referred to on most of these points.

The object of this rule seems to be to raise the question of the rector's right to preside at the vestry and regulate the polling without the concurrence of the vestry. But the 58 Geo. 3, c. 69, s. 2, expressly recognizes the common law right of the rector to preside, for that statute enacts, "for the more orderly conduct of vestries," "that, in case the rector or vicar, or perpetual curate shall not be present," the vestry assembled shall appoint some person to preside in his place. In *Wilson v. M'Math* (d) *Bayley* J. expressed an opinion that the language of this statute was strongly in favour of the minister's right to preside, and the judgment of Sir *J. Nicholl*, which is given in a note to that case, is a direct authority in favour of that right. If the rector has ex officio a right to take the chair, the further right must also belong to him, as chairman, of fixing the times and places of polling, and of doing all that is necessary to the orderly conduct of the business to be transacted. The chairman of the ves-

(a) On a former day in this term (May 30), before Lord *Denman* C. J., *Littledale*, *Patteson* and *Williams* Js.

(b) 5 A. & E. 865; S. C. 1 N. & P. 558.

(c) 8 A. & E. 356; S. C. 3 N. & P. 416.

(d) 3 B. & Ald. 241.

1840.

  
 The QUEEN  
 v.  
 D'O'YLY.

try must have the same authority in these respects as the returning officer in parliamentary elections. In *Stoughton v. Reynolds* (a) there is a mere obiter dictum that the vicar has no right to preside at the vestry, but the case will, perhaps, be cited in support of the rule, as an express decision that the right of conducting proceedings at vestry is in the parish at large. But that case turned entirely on the propriety of an adjournment, the vicar appears to have irregularly adjourned, without previous notice, to the interruption of the business in progress, (which is taken to have been the ground of that decision by Lord Denman C. J. in *Rex v. Archdeacon of Chester* (b),) and for the purpose of serving a particular candidate. As to *Rex v. Commissary of Winchester* (c), the question in that case was as to the legality of an adjournment at which the whole meeting concurred; no question arose as to the power of the chairman in this respect, and what Lord Ellenborough C. J. said, as to the churchwarden appointed by the rector having no right to preside because "he is not sworn," does not mean because he was not sworn as chairman, but because he had not been sworn in as churchwarden: in Lord Ellenborough's opinion, therefore, the rector would certainly have been a good chairman. But *Rex v. Archdeacon of Chester* (b), and *Rex v. Churchwardens of St. Mary, Lambeth* (d), where the facts were substantially the same as in the present case, are express authorities in favour of the chairman's right to adjourn, and to regulate the manner of polling, if this right is not exercised to the interruption of business.

Sir F. Pollock, Cresswell and Hayes contra. It is most important that the rector, who appoints one churchwarden, should not be vested with any authority, unless absolutely requisite, which may enable him to influence the election of the other churchwardens. But if besides appointing one

(a) 2 Str. 1045; S. C. Lee's Cas. & M. 413.  
 temp. Hard. 274, and Fortesc. 168.

(c) 7 East, 573.

(b) 1 A. & E. 342; S. C. 3 N.

(d) 1 A. & E. 346, n.

churchwarden he is to regulate at pleasure the manner of electing the others, on which occasion he has a casting vote, he may indirectly appoint all the churchwardens of the parish. If the general law is clear, that the minister and parishioners together are to have the controul of the election, the circumstance that the rector gave ample notice of his intention to take the controul upon himself can make no difference. If the rector presides, he has no more power than other persons who might take the chair in his absence. *Rex v. Archdeacon of Chester* (a) does not apply, for the notice of the manner of polling was given by the churchwardens who summoned the meeting, and no counter notice was given of any intention to object to the course prescribed. Lord Denman C. J. there observed, "Those who summon a meeting of this kind must necessarily lay down some order for the proceedings; and I think it is competent to them to say that the meeting shall be held in one place, and, in a certain event which may require it, shall be removed to another." In the present case the rector had nothing to do with summoning the meeting; it was summoned by a churchwarden and overseer. But *Stoughton v. Reynolds* (b), which has never been overruled, is conclusive against the power which the rector has assumed. In the report of that case in *Fortescue* occurs this passage in the judgment of Lord Hardwicke C. J., "At the common law anciently the sheriff could not adjourn the county court; for the suitors, not he, were the judges of it, though now the law has put that power in him. But in this case the law has not placed it in any one; wherefore we have not the power to take it from those who have it to place it in those who have it not."

There is no pretence for discharging this rule on the ground that the applicants by voting acquiesced in the proceedings which they seek to set aside, and *Holt v. Meddowcroft* (c) affords a strong authority that a party who once

1840.  
  
 The QUEEN  
 v.  
 D'ORLY.

(a) 1 A. & E. 342; S. C. 3 N. & M. 413.

(b) 2 Str. 1045; S. C. Lee's Cas. temp. Hard. 274, and Fortesc. 168.

(c) 4 Mau. & S. 467,

1840.  
  
 The QUEEN  
 v.  
 D'OYLY.

protests, "being as it were tied to the stake," is not to be taken to acquiesce, because when he is dragged on he endeavours to make the best of an adverse and irregular proceeding. [Lord *Denman* C. J. If there had been previous acquiescence in the rector's arrangement, that would be material, but the subsequent acquiescence is nothing.]

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—We think the proper place to elect churchwardens is some convenient place in the precincts of the church, and that the rector has a common law right and authority to preside at such election, as being the functionary who is at the head of the parish for ecclesiastical purposes; and though the churchwardens, when they are once elected, are the temporal officers of the parish, yet they are so far connected with ecclesiastical matters, that the rector has a clear and undisputed right to interfere in bringing them into existence.

If this matter had now been agitated for the first time, and if there had been no authority either the one way or the other, still we should have had no hesitation in giving this as our opinion, but it appears to us that the cases that have been decided most abundantly confirm this opinion, while the act of the 58 *Geo. 3*, c. 69, is to our mind most decisive. That act does not confer a right upon the rector to preside, that would not have been proper, as it might then have been said to have suggested doubts at least as to his right before; neither is it declaratory that he shall preside, but the language contained in it is an assumption and recognition of that right to preside, by making a provision with reference to the election of a chairman, in case of the absence of the rector, and by proceeding to state how that defect shall be supplied, thus clearly shewing that the right to preside was in him.

Then, assuming that the rector has the right to preside,

we next come to the question of what are the powers which that act confers upon him, and whether those powers have been exercised, in his function of presiding officer, rightly or otherwise than according to law. The statute in question requires notice to be given of the vestry meeting, but does not say who is to give that notice. We apprehend the rector, *quâ* rector, is the proper person to give that notice; he is for this purpose clearly at the head of the parish, and it devolves upon him to do so. The meeting is then held, the candidates are proposed, and a shew of hands taken. Somebody must then make a declaration, stating upon whom the election has fallen by the shew of hands. Who is to do this? Certainly not the body of the parishioners. That would only be doing the same thing over again. Certainly not the churchwardens; it does not fall within their duty. But it is clearly the person *presiding* at that meeting who is to make that declaration.

A poll is then demanded. Now the parishioners, in vestry assembled, are not the persons to consider whether that poll is necessary to be granted or not: it is demandable as of right by them; no one can refuse their demand of it, but the president of that meeting is the person alone who is to grant it, and in the ordinary course of things, in the absence of other business, that poll is to be proceeded with immediately. But, if there is other business before the meeting, or, if there are a number of voters remaining unpolled at the time of its close, an adjournment of it then becomes indispensable. Then arises the question, who is to determine the matter of adjournment? It was said that it was not the chairman who was to determine that question, but the majority of the voters. How are you to ascertain the majority in a constituency consisting of many thousands? Suppose the majority of those present were to decide in favour of an adjournment, then the second question must arise as to the place and time of adjournment. Again, suppose the majority were to vote against an adjournment, the consequence would be either that many voters would be

1840.

The QUEEN  
v.  
D'O'LY.

1840.

The QUEEN  
v.  
D'OYLY.

obliged to remain there during the night, or lose their votes, or the poll might be closed to suit the purposes of those who were present, by which many others would entirely lose the opportunity of voting. There are many places in the kingdom where something of this kind might be very likely to occur, from which the inconvenience of acting upon such a rule must be manifest.

But, setting aside the great inconvenience which might arise if the principle were laid down, that the right of adjournment was in the parishioners, we think that the person who, by virtue of his office, is to preside at the vestry, is also recognized, by virtue of his office, as possessing an authority to regulate the whole of the proceedings of that meeting, to preserve order and regularity, by which the poll may be taken during the election, as required by law, to decide on what the proceedings shall be, so as to insure to all the voters of the parish a reasonable and convenient opportunity of recording their votes, to adjourn the poll to such other time as he may think fit, and to do all those acts which are necessary, on his own responsibility; and, if any of those acts are improperly executed, he will then be called on to answer for his improper conduct in a court of justice.

There was another objection made during the argument, namely, that the chairman, having the casting vote under the 58 *Geo. 3*, c. 69, might, from that circumstance, in many cases, nominate both the churchwardens. There is no doubt he may vote as a parishioner, the act of parliament gives him that privilege, and, if any objection arises on this head, that objection can only be met by saying that parliament itself should have guarded against that inconvenience, but, as it has not, I apprehend this Court cannot interfere with the discretion of the chairman, when presiding at such an election.

We do not consider it necessary to enter into any particular discussion of the cases cited, as none of the judgments contained in them go to the extent contended for in this

case, while the cases themselves all point one way. The case of *Stoughton v. Reynolds*(a), as was very properly remarked during the discussion of the present case, has received an explanation from the Court, which makes it a good case for all the purposes for which it was intended. It does not say that the rector has not the power to adjourn the meeting, and to perform all the substantial duties for the purposes of that meeting, but that a reasonable exercise should be made of his discretionary power.

We think that in this case the rule must be discharged.

Rule discharged (b).

- (a) 2 Str. 1045; S.C. Lee's Cas. they have been unable to furnish  
temp. Hard. 274, and Fortesc. 168. a verbatim report of the above  
(b) The reporters regret that judgment.

Sir F. Pollock in Easter term last obtained a rule, calling upon the defendants, justices acting for the eastern half-hundred of Brixton, Surrey, to shew cause why a mandamus should not issue commanding them to hold a petty session, and receive thereat, from the vestry clerk of the parish of St. Mary, Lambeth, the list of the names of the persons nominated by the inhabitants of each of the four districts of the said parish in vestry assembled on Easter Tuesday last, to serve the office of overseers of the poor of the parish, and to select and appoint therefrom four persons to serve the said office; or to make such selection and appointment from the lists, delivered to them by the said vestry clerk at a petty session held by the said justices on the 27th April last, of the persons nominated for the purpose aforesaid, at the said vestry assembled on Easter Tuesday last.

The affidavits, in support of the rule, set out the same be nominated, and after a show of hands a poll was demanded:—Held, that the nomination was not necessarily to be confined to the persons present at the meeting, but that a poll might be lawfully had on a future day, so that other persons entitled to vote might take part in the nomination.

1840.  
The QUEEN  
v.  
D'OYLY.

The QUEEN  
v.  
HEDGER.

By a local act the inhabitants of each district in the parish, in vestry assembled, were to nominate a certain number of persons to be returned to justices at petty session, who were to select therefrom a certain number to be overseers.

At a vestry meeting for the above purpose, there was a contest as to the persons to



1840.

  
The QUEEN  
v.  
HEDGER.

notices which were set out in the former case, viz. the notice of meeting to be held at the Boys' School Room, on the 21st April, for the election of churchwardens and nomination of overseers; the rector's notice, that if a poll were demanded it would be held in the church porches; and the counter notice, that the school-room would be prepared as a more convenient polling place; and then stated, as in the former case, the proceedings had in the election of churchwardens.

It was then stated, that the vestry proceeded to the business of nominating four persons, out of each of the four districts in the parish, to be returned to the justices of the peace for Surrey, at the next petty session to be holden for the eastern half-hundred of Brixton, for the appointment therefrom of four to be overseers of the parish. That for each district, in succession, two competing lists of four candidates each were proposed and seconded; that in each case the question was put, and a shew of hands thereupon taken by the rector; that the numbers were then counted by the vestry clerk, and the result declared by the rector to the vestry; that thereupon a poll was demanded in each case, on behalf of the defeated party, and granted by the rector, to be taken at the same time and place as the poll which he had granted for churchwardens; that the assumption on the part of the rector to fix the time and place of polling was protested against; and that it was also objected that the granting any poll whatever upon the question of the district nominations for overseers, was contrary to the local act, which gave such right of nomination to the inhabitant rate-payers of the district, *then assembled in vestry* (a); that the poll was subsequently taken in conformity with the rector's notice; that on the 24th April petty sessions were held by the defendants, acting as justices for the eastern half-hundred of Brixton, when one of the overseers attended with the vestry clerk to deliver to the justices a list of the persons nominated by the vestry on the Easter Tuesday,

(a) See *The Queen v. The Vestrymen of St. Pancras*, post, 65, n.

but that the justices declined to receive the list, as the poll for overseers was then going on, and they adjourned the petty sessions to the 27th April; that on the 27th April the same list was again produced to the justices at petty sessions, and also a list of those who had a majority at the polls taken at the church; that the justices refused to recognize the former list, and that they appointed the four overseers from the list containing the result of the polls directed to be taken by the rector. The affidavits concluded by stating that the only case known to the deponents of a poll having been taken on the nomination of overseers was in the year preceding, and that the legality of such a course was then also disputed; and that on all such nominations the practice had been to take the votes of the rate-payers by single votes, whereas upon this occasion the votes were taken by pluralities, according to the amount of rate paid by the voters respectively.

The affidavits in answer stated, as in the preceding case, that all the applicants for the rule, except one of them, who had no vote, had voted at the poll.

Sir *J. Campbell*, A. G. and *Swann* shewed cause. Two additional objections (*a*), it is understood, are made to the proceedings in this case, the first, that the overseers ought to have been nominated by those only who were in vestry assembled on Easter Tuesday; secondly, that the polling by plurality of votes was, at all events, illegal. By 50 *Geo. 3*, c. xix. s. 11, (local and personal) intituled "An Act for better assessing and collecting the Poor and other Rates in the Parish of Lambeth" &c. after reciting the customary mode of electing the overseers in that parish, it is enacted, that "the inhabitants of each of the said districts or liberties of the said parish of Lambeth, being rated to and paying the poor rate, shall, in vestry assembled, or the major part of them then present, nominate four substantial householders residing within the said district or liberty, for and

1840.

The QUEEN  
v.  
HEDGER.

(*a*) See the preceding case.

1840.

  
The QUEEN  
v.  
HEDGER.

by which they shall be so nominated, to serve the office of overseers of the poor of the said parish; and the vestry clerk of the said parish shall cause a list of the names of the persons so nominated by the said four districts or liberties to be made, which list shall distinctly set forth the several districts or liberties by and for which each of the said persons has been respectively nominated in manner aforesaid, and shall deliver such list to the justices of the peace acting in and for the eastern half hundred of Brixton, in the said county of Surrey, at their next ensuing petty session, or any other to be thereafter held," and that the justices shall select from each such list one person to be overseer. Those who had the majority on the poll have been properly selected, in preference to those who had the majority on the shew of hands by the persons in vestry assembled. There is no special custom in the parish, nor is there any provision in the local act to exclude the right to demand a poll, which is by law incident to the election of a parish officer by shew of hands, *Campbell v. Maund* (a): nor to exclude the principle of plurality of votes, as directed by the general act, 58 Geo. 3, c. 69: *Rex v. St. James, Clerkenwell* (b). According to *Anthony v. Seger* (c), where a poll is demanded, all that is done before is abandoned.

Sir *F. Pollock* and *Hayes*. Nothing turns upon the plurality of votes, nor would a poll have been objectionable if it had been confined to those who were in vestry assembled, and been finished instantly. 'The local act directs the nomination to be made by those who are "in vestry assembled." The poll therefore, at a subsequent day, which admitted those who were not assembled in vestry, was illegal. The very word nomination has a peculiar application to those who were in vestry assembled. There is to be no *election*, but *after* the preliminary act of nomination, the ultimate

(a) 5 A. & E. 865; S. C. 1 N. & P. 558.

(b) 1 A. & E. 317; S. C. 3 N. & M. 411.

(c) 1 Hagg. Ca. Cons. Court, 13.

step in the appointment of overseers is to be taken by the justices. The same word occurs in 1 & 2 Will. 4, c. 60, s. 14 (a), which authorizes the "nomination" of inspectors of votes at the elections for vestrymen and auditors. If the proper construction of the Lambeth local act is, that the nomination of overseers must be made by those only who are assembled at the vestry, the special provision is saved by the 8th section of the general act 58 Geo. 3, c. 69.

1840.  
  
 The QUEEN  
 v.  
 HEDGER.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This case of the overseers of St. Mary, Lambeth, does not materially differ from that of the churchwardens. The whole of the question arises upon the peculiar language of the 11th section of the local act of parliament. That section provides that the inhabitants of each of the said districts or liberties of the parish of Lambeth, shall in vestry assembled, or the major part of them then present, nominate four substantial housekeepers to be returned to the justices for their appointment therefrom of overseers. That provision does not appear to us to confine the nomination to the persons then present at that first meeting, any more than such words would extend to prevent any of the parishioners from coming in while the poll was going on. Then with regard to the word "nominate," used in the act, it appears to us to be a word peculiarly proper to be used, because the inhabitants do not elect, they only fix upon certain names, which are to be put into a list to be delivered to the justices from which a selection is to be made by them. Upon this subject we granted the rule more for the purpose of avoiding any collision with what we decided in last Michaelmas term respecting the parish of St. Pancras (a), than from any doubt we entertained upon the case. There, there was an actual neces-

(a) See note (b) at the end of this case.

1840.

**The QUEEN**  
v.  
**HEDGER.**

sity for the nomination of inspectors taking place and being concluded at the meeting, such nomination being an initiative proceeding which was necessary before any election of the vestrymen and auditors could be entered upon: therefore, there, from the necessity of the case, the word "nomination" required the construction put upon it. There is no such necessity here, and therefore the argument does not arise for a similar construction. We therefore think that what was done in this case was right, and that this rule also must be discharged.

Rule discharged (a).

(a) The Reporters regret that they have been unable to furnish a verbatim report of the above judgment.



**The QUEEN**  
v.  
**Vestrymen of**  
**ST. PANCRAS,**  
as to the nomination of inspectors of votes, preliminary to the election of vestrymen, under 1 & 2 Will. 4, c. 60, s. 14.

(b) The following judgment, in the *The Queen v. The Vestrymen of St. Pancras* (the case referred to), was delivered in Michaelmas term, 1839, by

LORD DENMAN C. J.—This was an application to compel proceeding to a new election of vestrymen, on the ground that the election which took place in May was a nullity, the sense of the meeting, in respect of the nomination of inspectors not having been duly taken by the churchwardens who presided there. The act 1 & 2 Will. 4, c. 60, requires the nomination of eight inspectors as preliminary to the election of vestrymen, four by the churchwardens, and four by the meeting. On this occasion, the churchwardens having nominated their four, called on the meeting to nominate four others. Two lists of four were accordingly prepared by the two parties, and a shew of hands having been required on both successively, the churchwardens expressed their decision in favour of one set; upon which the friends of the other demanded a division of the voters present, that the numbers appearing on each side might be counted. This course the churchwardens refused to take, though frequently pressed to do so, and declared the election carried by the shew of hands as at first.

*Quære*, if on such nomination a shew of hands is taken and the result disputed, is the question to be determined by a division of those present, or by a general poll?

At all events the decision of the returning officer as to the result of the shew of hands is not conclusive, if it appear to have been influenced by partiality.

The affidavits in support of the rule went into a vast deal of extraneous matter, not enough connected with our immediate subject to require notice here: expressions of the more active churchwarden were deposed to, shewing a determination to favour his own party, which were by no means satisfactorily explained away by himself. The defeated party claimed the majority of votes at the meeting, but the other party were in much greater numbers, to their confident belief, the other way. In arguing against the rule many propositions were laid down

which appeared to us wholly untenable. It was boldly urged, that the decision of a returning officer is binding and conclusive, however partial and unfair, *and in whatever degree his partiality and unfairness may have affected the result of the election.* What he chooses to declare (it was said) must stand, though his misconduct may expose him to punishment. The claim of such a privilege refutes itself. Mere feelings of partiality in a returning officer towards the successful candidate cannot be sufficient to vacate the election conducted fairly and with regularity; but, if proper means are taken for challenging an election good in form, but reasonably suspected to be the result of manœuvring practised by persons in authority for selfish or party purposes, we cannot be bound by a result so brought about, and cannot refuse to put the facts into a course of inquiry. And the temporary inconvenience, though much to be lamented, that may be produced by changes and new elections, is an evil infinitely less than the encouragement which would otherwise be afforded by this Court to an arbitrary abuse of lawful power. The difficulty, or impossibility rather, of complying now with the act of parliament, on account of the lapse of time, was not very strongly pressed. For, though the election is fixed to take place in May, yet the well known practice of the Court is to set aside vicious proceedings held at the regular period and direct others in their place afterwards. It would be too great a triumph for injustice if we should enable it to postpone for ever the performance of a plain duty only because it had done wrong at the right season.


Then the mode of nominating inspectors required by the act was described as not essential but directory, so that non-compliance with its forms would not vitiate an election *de facto*. We need say no more in answer to this doctrine than that the powers granted by the act to the inspectors place the fate of the election itself completely in their hands, so that every thing depends on their being faithfully nominated.

Another argument required much more consideration. The returning officers say that those who objected to their proceedings did so on wrong grounds and made a wrong demand upon them. They contend that only two modes of election are known to the common law,—by shew of hands, and by a poll: and that the objectors, who complained that the decision on the shew of hands was incorrect, ought to have demanded a poll, not that the meeting should be divided and the number on each side counted, an intermediate course unknown to the ordinary practice, and which no returning officer could be bound to introduce. On this point the learned counsel in support of the rule, referring to the 14th section of the act, asserted that a third mode of election, or rather appointment, is thereby introduced; that the *nominations* of inspectors is to be made at the meeting, *i. e.* by such as happen to be present at the meeting; that, therefore, where the shew of hands is disputed, those present at the meeting must be divided, and those giving their votes on either side counted by the officer; that this mode of ascertaining a majority is practised in both houses of parlia-

1840.

The QUEEN  
v.  
Vestrymen of  
ST. PANCRAZ.

1840.

  
The QUEEN  
v.  
Vestrymen of  
ST. PANCRA'S.

ment, and that a poll, by admitting all parishioners to come in and vote, would be inconsistent with the act which refers the decision to that meeting. [His lordship here read 1 & 2 *Will.* 4, c. 60, sec. 14, which requires rate-payers to meet at the election of vestrymen, "and then and there to nominate eight rate-payers of the said parish as fit and proper persons to be inspectors of votes."]

We are much struck with these observations, and think the reasoning at least plausible. The business of nominating inspectors is apparently intended to be begun and finished at that meeting, some reasonable precaution being taken that none but rate-payers are present, and the election of vestrymen is to follow without more delay: if the shew of hands and poll were the method, the preliminary process itself might be indefinitely prolonged, for the common law right on that subject is generally understood to be, that any voter, however satisfied with the correctness of the declaration on the shew of hands, yet may appeal from it to the whole body of electors, and keep a poll open till all have had the opportunity of attending to record their suffrages. Now, if the churchwardens were bound to declare the nomination of the four inspectors as made by that meeting, they had no other means of coming to a just conclusion, than by dividing and counting those present, as they were required to do, supposing any doubt to exist on which side the majority appeared. But we do not deem it absolutely necessary for our present decision to lay down any rule on the 14th section, for, whether that construction prevail, or the more ordinary method be adopted, the shew of hands ought to be fairly taken. Was it so taken? A strong doubt was expressed at the time whether the churchwardens had not made an erroneous report of the numbers on each side; it is even now sworn by several who were present that the majority was the other way. Nothing could be more reasonable than the demand that the numbers should divide and be counted. If this had been done with closed doors, it certainly would have been attained in a few minutes. But the churchwardens took upon themselves to declare the respective numbers in favour of that party to which they avowedly belong, at the very moment when they refused to ascertain the truth. The affidavits now produced by them and many others, of their belief respecting this doubtful matter, do not meet the just complaint, that they might have spoken with perfect knowledge, and that belief is indeed founded on remarks and reasonings which are detailed, and are very far from being conclusive.

These considerations have brought us to the opinion that the mandamus ought to issue.

Rule absolute.



1840.

*Wednesday,  
June 10th.***The QUEEN v. The Inhabitants of EXMINSTER.**

**ON** an appeal to the Devon quarter-sessions of July, 1839, against a rate for the relief of the poor of the parish of Exminster in the said county, the sessions amended the rate by striking out the assessment hereinafter mentioned, subject to the opinion of the Court on the following case.

The mayor, aldermen, and burgesses of the city and borough of Exeter, which is a county of itself, are assessed as the occupiers of a canal in the parish of Exminster in the following terms. [Here followed the form of the rate.]

The said canal passes through the several parishes of Exminster, Alphington, and St. Thomas, in the county of Devon, no part thereof being in the city of Exeter, but communicating with that city by means of the navigable river Exe, and the canal and towing paths adjoining belonging to the said mayor, aldermen, and burgesses in their corporate capacity, and are in their own actual occupation.


The tolls and dues arising therefrom are payable by virtue of an act of parliament passed in the year 1829, for "altering, extending and improving" the canal: and the annual income produced by them is more than sufficient to pay the interest of a mortgage to which they are subject.

No mention is made in the said act of any purpose to which the surplus income should be applied, nor any provision whereby the tolls and dues should at any time be discontinued, but they are parts of the income and general resources of the said municipal corporation, and are collected by their officers, who are paid by salaries, and by them paid over to the treasurer of the borough to the account of the borough fund.

These properties were formerly rated to the relief of the poor of the city of Exeter, but for several years prior to the passing of the 5 & 6 *Will.* 4, c. 76, they had been rated to the relief of the poor of the said parish of Exminster, which rating had been acquiesced in, and the rates thereupon paid.

A corporation is not rateable to the relief of the poor in respect of lands, of which the profits are payable to the borough fund, under 5 & 6 *Will.* 4, c. 76, s. 92, although the land is situate in a parish without the limits of the borough.



1840.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

The question for the opinion of the Court is, under the circumstances above stated, whether the mayor, aldermen, and burgesses of the city of Exeter are rateable to the relief of the poor of the parish of Exminster for the properties aforesaid.

If the Court should be of that opinion, the rate to stand without amendment: if they are not so rateable, the rate to be amended by striking out the above assessment.

*F. N. Rogers*, in support of the order of sessions, having referred to *Reg. v. Liverpool (b)*, as deciding that corporation property is not rateable, and as governing the present case, the Court called upon


Sir *J. Campbell A.G.*, Sir *F. Pollock*, and *Manning Serjt.* contrà. It is clear that corporation property is *primâ facie* rateable, and that it has always been rated hitherto; but it is contended that, by virtue of the municipal corporation act, 5 & 6 Will. 4, c. 76, s. 92, as construed by the Courts in *Attorney General v. Aspinall (c)*, and *Reg. v. Liverpool (b)*, corporation property has now become trust property for public purposes; and therefore no longer rateable.

Between *Reg. v. Liverpool (b)* and the present case, however, there is this obvious distinction, that there the borough property, which had been rated, was *within* the parish to which it was rated, so that if the borough had been rated to the parish, the inhabitants of the parish who had been relieved by the contribution of the borough, might afterwards have been rated by the borough to make up the very deficiency in its funds which had been occasioned by its rateability to the parish. The decision in that case may well be supported on the ground taken in *Rex v. Beverley Gas Works (d)*, that the thing was as broad as it was long, and consequently the rateability of the property in question quite immaterial.

(a) In Easter term last (May 6),  
 before Lord Denman C. J. *Little-  
 dale, Patteon and Coleridge Js.*

(b) 1 P. & D. 334.  
 (c) 2 Mylne & Cr. 613.  
 (d) 1 N. & P. 646.

In the present case, however, the borough property, which is assessed to the relief of the poor, is situate in a foreign parish. That parish has no concern with the borough; if there be a deficiency in the borough fund so that a borough rate should become necessary the parish will not have to contribute. The prosperity of the borough fund, therefore, will afford the parish no set off against the loss it will sustain if the borough property situate therein is exempt from contribution to the maintenance of the parish poor.

1840.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

If the corporation of Exeter had let the land in question, would not their tenant be rateable? How can the circumstance that they occupy by their own bailiff vary the liability? The property is of the same character in either case; it is public property in both cases or in neither. If it was private property before the passing of the 5 & 6 Will. 4, c. 76, and rateable to the poor, it must remain subject to all previous charges and liabilities, although, on the other hand, an immunity which has once belonged to property, as being in the crown, or on other public grounds, ceases as soon as that property comes to the hands of a private individual. The consequence of holding that property of this description is not rateable may be that in some instances the parish will not have to pay one farthing for the support of its own poor. Suppose, what is by no means unlikely to be the case in many parts of the kingdom, that the whole parish were borough property. There would then be no rateable property in the parish. It is true that the poor would not necessarily be without relief, for other parishes might be rated in aid; but no such alternative could be had recourse to for the maintenance of the parish church and highways.

With reference to the present question, *The Attorney General v. Aspinall* (a) appears to have decided nothing more than that corporation property is now trust property, and so subject to the general jurisdiction possessed by the Court of Chancery in cases of trusts. What is the charac-

(a) 2 Mylne & Cr. 613.

1840.

  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

ter of that trust, whether of a public or of a private nature, was not decided, and remains still to be considered. And in *Reg. v. Liverpool* (a), the conflicting interest of the parish on the ground of circuitous rateability, as it were, appears to have rendered unnecessary the decision of the general question which now arises. That the situation of the property in a foreign parish is important in testing its rateability, appears very plainly from *The Governors of Bristol Poor v. Wait* (b), and *Reg. v. The Guardians of Wallingford Union* (c). It must, therefore, be now considered in what sense the corporation of Exeter are trustees for the public. What are the public purposes? The very first purpose to which the borough fund is to be applied, after payment of debts, is to the payment of salaries to the mayor and other corporate officers. The payment of salary to the minister of a chapel out of pew-rents was considered in *Rex v. Agar* (d) to make the trustees of a Methodist chapel rateable in respect of it. If after the various purposes to which the borough fund is applicable, there is any surplus, it is to be applied for the public benefit of the inhabitants and improvement of the borough; if, on the other hand, there is a deficiency for the purposes aforesaid, that deficiency is to be supplied by a borough rate in the nature of a county rate to be made within the borough. The parties, then, to the present issue are not the parish of Exminster on the one hand, and the public at large on the other. The real parties are one small class of the public against another similar class, viz. the rateable inhabitants of the parish of Exminster against the rateable inhabitants of the borough of Exeter, and the corporation are ultimately trustees for this latter class, and not for the public. If this borough property is made to contribute to the rate of Exminster, who will gain? The rateable inhabitants of Exminster. Who will suffer? The rateable inhabitants of the borough

(a) 1 P. &amp; D. 334


(c) 2 P. &amp; D. 226.

(b) 5 A. &amp; E. 1; S. C. 6 N. &amp;

(d) 14 East, 256.

M. 383.

of Exeter. For the consequence may be, that they will be assessed to make good the deficiency arising from the payment which the corporation have had to make to the poor of Exminster. [*Patteson J.* The same reasoning would apply to *Rex v. Trustees of Weaver Navigation (a)*, where the surplus tolls of a navigation were directed by statute to be expended in repairing the bridges within the county of Cheshire. There, it was said, the public are not interested in the surplus, but merely the landholders of the particular county. Yet the trustees were held not rateable.] After that case had been argued, it stood over to await the result of *Rex v. Liverpool (b)*. In *Rex v. Liverpool* the public of the whole kingdom were ultimately interested in the lowering of the dock dues, and it was accordingly decided that the Dock Company were not rateable, because their rateability would have rendered the Company less able to lower the dues payable by the public. This decision was made to govern *Rex v. Trustees of Weaver Navigation (a)*, and the difference, which has just been pointed out, between the two cases was not then adverted to. In the present case the corporation are trustees for the rate-payers of the borough of Exeter, just as much as the corporation of York were trustees for the freemen entitled to pasture in *Rex v. Mayor of York (c)*.

1840.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

But, even if the whole kingdom can be said to have a direct interest in the payment of the salaried officers of the corporation of Exeter, and in the improvement of that borough, and in the exemption of the inhabitants from a borough rate, the corporation are rateable as trustees for those who have a mortgage upon this property, a class of persons who do not in any sense represent the public. If the mortgagees had taken possession, either occupying themselves, or letting the land, it would clearly be rateable. The corporation, as the mortgagors, are, in fact, at this moment, tenants to the mortgagees; tenants at will if they occupy with

(a) 7 B. & C. 70, n.

(b) 7 B. & C. 61.

(c) 6 A. & E. 419; S. C. 1 N. & P. 539.


1840.

  
The QUEEN  
v.  
Inhabitants of  
EXMINSTER.

the consent of the mortgagees; tenants at sufferance if they occupy without such consent; the corporation might be sued for use and occupation. There is clearly a beneficial occupation by the corporation to the extent of the interest of the mortgagees. The case, on this point, is not to be distinguished from *Reg. v. Company of Blackfriars Bridge (a)*. In that case a local act enabled a company to raise by shares a capital for the purpose of building a public bridge in Lancashire, and to raise a further sum, if necessary, by mortgage, and to take tolls; the tolls to be applied, after paying the expenses of the act, to payment of interest to the mortgagees, and the surplus to payment of a dividend to the proprietors, not exceeding seven and a half per cent. on their shares, the residue to be applied to paying off the shares, and mortgage debt, to form a repairing fund, and then the tolls to cease altogether. The bridge in that case was clearly a public benefit, and ultimately to become a net benefit to the public alone, without collateral benefit to any individual or class; the intermediate benefit to the proprietors and mortgagees was merely the machinery for effecting that public benefit. The mortgage debt had not been paid, and no surplus for a dividend had ever existed. The mortgagees were the only persons who received anything from the tolls. It was held that the company had a beneficial interest in the property notwithstanding, and that they were rateable to the poor, *Littledale J.* saying, "Suppose a public-spirited individual, with a large capital, should determine to build a bridge for the benefit of the public, and should obtain an act like the present to enable him to take tolls until his capital were repaid, would not he have a beneficial interest in the property?" So, in this case, if the corporation had no more than sufficient to pay interest to the mortgagees the land would be rateable, and must be rateable at all events in respect of the interest in it which the mortgagees are entitled to.

(a) 1 P. & D. 603.

*F. N. Rogers, Greenwood, and Merivale contra. Reg. v. Liverpool* (a) was not decided on the narrow ground that the borough and parish of Liverpool are conterminous, nor are they so in fact, but on the general ground that the corporation occupied for public purposes, and consequently that there was no beneficial occupation. The question as to the fact of beneficial occupation cannot be affected by the locality of the property occupied, although, assuming the fact of beneficial occupation, the propriety of rating property may depend entirely on its locality. Where property is occupied for private benefit, as in *Governors of the Bristol Poor v. Wait* (b), and *Reg. v. Guardians of Wallingford Union* (c), the circumstance that the property does not belong to the parish about to make a rate is most material, because the parish would lose by the abstraction of so much rateable property, and is not benefited by the occupation. On the other hand, where property is occupied by the public, the parish, which loses so much rateable property, may also be taken to benefit, as part of the public, by the occupation. Nor can the character of the occupation be affected by the circumstance that, in the event of the property occupied becoming insufficient, a particular class is liable to contribution. The essential matter to be considered is, what is the ultimate destination of the fund? If a borough rate should become necessary in Exeter, that will not affect the occupation of the borough property, or the application of its funds: the occupation will not be a beneficial occupation any more than if no borough rate were necessary.

1840.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

They then went through the cases upon occupation for public and charitable purposes, to shew that, when the object of the occupation approximates to a public benefit, property is not rateable, although the rule is otherwise, where, as in *Rex v. Agar* (d), particular individuals are benefited.

(a) 1 P. & D. 334.

(c) 2 P. & D. 226.

(b) 5 A. & E. 1; S.C. 6 N. & M.

(d) 14 East, 256.

1840.

  
The QUEEN  
v.  
Inhabitants of  
EXMINSTER.

With regard to the interest of the mortgagees making the property in question rateable, the particulars of the mortgage are not stated so as to raise the question, and the crown may be the mortgagee. In *Reg. v. The Blackfriars Company* (a) the public purpose was subordinate to the private speculation, and the immediate effect of the speculation, if successful, would have been to benefit the shareholders. In *Rex v. Salter's Sluice Navigation* (b), and other cases, where there was originally no beneficial occupation, the circumstances of the property being under mortgage has not made it rateable. In this case the mortgagees must, at all events, obtain their money, so that it is immaterial to them whether there is a rate imposed on the borough property for the purpose of paying them; the borough alone will suffer. The sole question is, whether the borough property is occupied for public purposes: whether the corporation spend their own money in the first instance, or borrow for the same purposes, can make no difference.

Sir J. Campbell A. G. in reply. Even if it be admitted, for the sake of argument, that all the purposes to which the borough fund is to be applied are public purposes, still the burden of executing those purposes is ultimately thrown upon a particular class, the rateable inhabitants of the borough, and they, not the public, are interested in the present question; the decision of it cannot affect those purposes themselves, which must at all events be executed, but it may shift the burden of them. It is true that the present argument would have applied in some of the cases cited of supposed public occupation, but the argument has never been pressed before.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—The question in this case was, whether the corporation of Exeter was rateable for tolls received by them in

(a) 1 P. & D. 603.

(b) 4 T. R. 730.

a different parish from any in which the city is situate. A distinction was attempted to be drawn between this case and that of *Reg. v. Liverpool* (a), on the ground of this property being in a parish out of the borough. We are of opinion that there is no ground for the distinction. In *Reg. v. Liverpool* (a), the Court held that, under the Municipal Reform Act, property held by a corporation for corporate purposes is not rateable. After reconsidering the provisions of that statute, and after examination of all the authorities, we consider the principle there laid down to be a right principle, and that it applies whether the property is in the same parish in which the city, or any part of it, is, or in any other parish.

1840  
 The QUEEN  
 v.  
 Inhabitants of  
 EXMINSTER.

Order of Sessions confirmed.

(a) 1 P. & D. 334.

DOE *d.* NICHOLSON and another *v.* WELFORD.

**EJECTMENT** on the several demises of *Edward Nicholson* and *Catherine* his wife, in right of the said *Catherine*, and of *Elizabeth Dobson*, for a copyhold messuage &c.

On the trial before *Alderson B.*, at the Northumberland summer assizes, 1838, it appeared that, by a surrender of the 1st May, 1787, certain persons therein named surrendered into the hands of the lord of the manor of Hexham the messuage now in dispute, to the use of *Cuthbert Teasdale* for and during the term of his natural life, without impeachment of waste; and from and after the decease of the said *Cuthbert*, then to the use of such one or more or any of the children of the said *Cuthbert*, on the body of *Ann* his late wife deceased, begotten, and for such estate and estates, and in such parts, shares and proportions, manner and form, as the said *Cuthbert* should at any time or

*Tuesday,  
 June 2nd.*  
*Admitted* that an appointment in favor of children, with remainder to grandchildren, under a power to appoint to children, is void for the excess only.

Under the same instrument an estate for life was given to *D. T.*, remainder to *K. T.* for life, remainder to *D. T.* and the heirs of his body.

*Quere*, whether the rule in *Shelley's* case applies to such a case, the remainder not being to the heirs of the body of the tenant for life, but to him and such heirs.

Held, that at all events *D. T.* has no power to bar the intermediate estate for life to *K. T.*



1840.

DOE

d.

NICHOLSON

v.


WELFORD.

times during his life, by any deed or deeds, writing or writings, under his hand and seal, attested by three or more credible witnesses, direct, limit, give, or appoint the same; and in default of such direction, limitation, gift and appointment as aforesaid, then to the use of *Daniel Teasdale*, first son of the said *Cuthbert*, on the body of the said *Ann* his late wife begotten, and of the heirs of the body of the said *Daniel*; and, in default of such issue, then to the use of *Richard Teasdale*, second son of the said *Cuthbert*, as tenant in tail; and, in default of issue to *Richard*, then to the use of *Catharine Teasdale* and *Elizabeth Teasdale* (being the said *Catharine* and *Elizabeth* parties in this action), as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of the said *Catharine* and *Elizabeth*; and in default of issue to *Catharine* and *Elizabeth*, to the right heirs of *Cuthbert* for ever.

*Cuthbert* was thereupon admitted. By his will of the 20th September, 1819, *Cuthbert*, after reciting the said surrender of the 1st May, 1787, and the power of appointment thereby given, did direct, limit and appoint the said messuage, &c. to the use of his son *Daniel Teasdale* for his life, and after his decease, as to one moiety of the messuage, he limited and appointed the same to the use of his daughter *Catharine*, wife of *Edward Nicholson* (one of the lessors of the plaintiff), for her life, and, after her death, to the use of his grand-daughter, *Ann Elizabeth Teasdale*, daughter of his son *Richard Teasdale*, in fee; and as to the other moiety of the messuage, he limited and appointed it to the use of his daughter *Elizabeth Dobson*, widow (the other lessor of the plaintiff), for her life, and from and after her decease, to the use of his grand-daughter *Elizabeth Dobson*, spinster, in fee.

After *Cuthbert's* death, *Daniel Teasdale* was admitted under the above appointment, on the 22d April, 1835; and by a surrender, bearing date the same day, for the purpose of docking and barring all estates tail, and all rever-

sions and remainders thereupon expectant, he surrendered the messuage into the hands of the lord, for the use of *Edward Welford*, the defendant, and his heirs and assigns, subject to redemption on repayment of 100*l.*, and *Welford* was thereupon admitted. *Daniel Teasdale* died in 1836, and the day of the demise in the declaration was the 20th May, 1836.

1840.  
  
 Doe  
 d.  
 NICHOLSON  
 v.  
 WELFORD.

The lessors of the plaintiff were admitted on the 25th April, 1838, before the assizes at which the trial took place.

On this state of facts the learned judge directed a verdict for the plaintiff, giving leave to move to enter a nonsuit.

*Cresswell*, in the Michaelmas term following, obtained a rule nisi for entering a nonsuit, on three grounds: 1st. That the appointment was bad, because the power is to appoint to children only, whereas the appointment has been extended to grand-children, who were not the objects of the power: that therefore there had been no appointment, and as *Daniel*, in default of appointment, took an estate tail, so he had power to bar it by surrender. 2dly. That supposing the appointment to be good pro tanto, *Daniel* took an estate for life under it, and as by the surrender of the 1st May, 1787, the messuage was limited to *Daniel* in tail in remainder, therefore that he had a complete estate tail, and might bar it by surrender. 3rdly. That the lessors of the plaintiff had been admitted since action brought.

*W. H. Watson* and *Otter* now shewed cause; but, as the first and last points were given up, the arguments relating to them are omitted, and the cases which were cited are alone given. As to the 1st point, they cited *Crompe v. Barrow*(a), *Bristowe v. Ward*(b), *Adams v. Adams*(c), 2 *Sugd. Powers*(d), *Brudenell v. Elwes*(e), *Roberts v. Dixwell*(f). As to 3rd point, they cited *Holdfast d. Wool-*

(a) 4 Ves. jun. 681.

(b) 2 Ves. jun. 336.

(c) Cowp. 651.

(d) 6th ed. p. 66.

(e) 1 East, 443.

(f) Cited in the Appendix to  
2 *Sugd. Pow.* No. 17, (6th ed.)

1840.

DOE  
d.NICHOLSON  
v.  
WELFORD.

*lams v. Clapham* (a), *Doe d. Bennington v. Hall* (b), *Gyp-  
pen v. Bunney* (c), *Auncelme v. Auncelme* (d), *Doe d. Cosh v.  
Loveless* (e).

As to the 2nd point. First, The rule in *Shelley's* case does not apply, so as to make the life estate of *Daniel* coalesce with his remainder, to the exclusion of the intervening life estates appointed to *Catherine* and *Elizabeth*. That rule is thus stated; "When the ancestor, by any gift or conveyance, passes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases the heirs are words of limitation of the estate, and not words of purchase," 4 *Cruise*, Dig. tit. 32, c. 23, s. 2; and it may be admitted that *Daniel* takes in the same manner as if the power and the instrument executing the power had been incorporated in one instrument; *Middleton v. Croft* (f), 2 *Sugd. Pow.* (g). Yet this case does not fall within the rule, because though *Daniel* has an estate for life, yet the subsequent limitation is not to his heirs in tail or in fee, but an express estate tail is given to *Daniel himself*, subsequent in point of limitation to the life estates of the lessors of the plaintiff, and in such case *Daniel* could not bar those life estates by surrender. But, even if the rule in *Shelley's* case be applicable, the surrender by *Daniel* will not bar the life estates, which are prior, in point of limitation, to the estate tail in remainder. It is clear that the remainder limited to the lessors of the plaintiff are vested remainders, and it is difficult to understand how a remainder, which has once vested, can be defeated, for, according to the rule laid down in 4 *Cruise*, Dig. tit. 32, c. 23, s. 12, p. 329, and adopted by Mr. *Fearne*, Cont. Remainders, p. 33, where the limitations intervening between the first estate for life and the limitations to the heirs of the body are

(a) 1 T. R. 600.

(b) 16 East, 208.

(c) Cro. Eliz. 504.


(d) Cro. Jac. 31.

(e) 2 B. &amp; Ald. 453.

(f) 2 Atk. 650—661.

(g) P. 26, (6th ed.)

contingent, the estate for life is not merged, because the intervening limitations would be thereby destroyed, but the two limitations are united and executed in the ancestor only till such times as the intervening limitations become vested, and then they open and become separate, in order to admit such intervening limitations when they arise. As then the life estate is considered not to merge, in order that the intervening limitations which depend upon that prior life estate may not be destroyed, and as the two limitations open when the intervening limitations become vested, it would follow, that when such limitations are vested in their origin that the two estates can never unite. Again, no estates or interests are barred by a common recovery (which would have the same effect as this surrender) but those which are subsequent in point of limitation to the estate of which the recovery was suffered, for all interests precedent remain as they were before. *Smith d. Richards v. Clyfford* (a) is an authority for the plaintiffs.

1840.  
  
 DOE  
 d.  
 NICHOLSON  
 v.  
 WELFORD.

*Cresswell, Alexander, and Wightman* contra. The case is within the rule in *Shelley's* case, as stated in *Fearne*, and *Gilbert C. B.*, in 6 Bac. Abr. (b) (Remainder B.) 655. The appointment of an *express* estate tail to *Daniel* in remainder makes no difference; there is no greater difficulty in holding that the two estates limited to *Daniel* unite, and that he takes an immediate estate tail, than if the remainder had been limited in the usual way to the heirs of his body. In *Smith d. Richards v. Clyfford* (a) it was not necessary for the Court to consider whether *Richards'* estate for life and remainder in tail united, and the point decided was merely that *Richards*, whatever kind of estate he possessed, had certainly not committed a forfeiture, because the recovery suffered by him might have a legal operation

(a) 1 T. R. 738. They cited also Cruise Dig. vol. v. tit. Recovery, c. 10, sect. 1 (articles 6 & 7); *Pledgard v. Lake*, Cro. Eliz. 718; *Doe d. Lumley v. Earl of* *Scurborough*, 3 Ad. & E. 42; S. C. 4 N. & M. 758; Cruise's Essay on Fines and Recoveries. (b) 7th ed.

1840.  
  
 DOE  
 d.  
 NICHOLSON  
 v.  
 WELFORD.

on his own remainder. The question in this case is, whether *Daniel's* remainder is postponed to the two life estates. [*Patteson* J. If it is not, you must contend that if *Daniel* had died, leaving a son, that son would have taken before these tenants for life.] Yes; if there had been no recovery on *Daniel's* death, his heir would have been entitled to succeed him immediately. In *Venables v. Morris* (a) it is said by Lord *Kenyon* C. J., "an estate was limited to *S. Morris* for life, and after several intermediate limitations, an estate was limited to his heirs for ever; and whether the last be a legal or an equitable estate makes no other difference than this, that in the one case the heir will take as a purchaser, in the other by descent; but quacunque viâ datâ the defendant is entitled in this case. For, if the limitation to the heir of *S. Morris* be a legal estate, it enlarged the estate in the ancestor, and gave him the legal fee; if it be an equitable remainder, to which the prior legal estate in the ancestor could not be limited, it was a contingent remainder to the heir, and the heir takes as a purchaser." In conformity with this language, the certificate, subsequently sent to the Lord Chancellor (b), decided that the remainder in question did not unite with the life estate of *S. Morris*, because the former was an equitable and the latter a legal estate. But it is clear from this language that, if both estates had been legal, or both equitable, Lord *Kenyon* thought they would have united.

LORD DENMAN C. J.—We granted this rule on account of the dictum in *Venables v. Morris* (a), in order that the point might be discussed. If we had taken time for consideration we should have seen that the point was altogether free from doubt, and have refused the rule. It appears from Mr. *Fearne's* learned work (c), that where a person by the same conveyance takes a particular estate and a mediate remainder in fee or in tail, the subsequent estate limited to him is to take effect as a *remainder* after the deter-


(a) 7 T. R. 342.

C. R., by Butler, (9th ed.) 59 n.

(b) See 7 T. R. 438, and *Fearne's*

(c) P. 28—37.

mination of the interposed estate, and this in cases where the rule in *Shelley's* case certainly applies. Assuming, therefore, the rule in *Shelley's* case to apply here, (which I think is not the correct view,) the act of the tenant in tail in remainder could not bar the antecedent life estates. The language of Lord *Kenyon* in *Venables v. Morris* (a) was not necessary to the decision. This rule must be discharged.

1840.  
  
 DOE  
*d.*  
 NICHOLSON  
*v.*  
 WELFORD.

LITTLEDALE J.—Whether the rule in *Shelley's* case does apply or does not apply to the present case, where the remainder to *Daniel* is not to the heirs of his body, but to *Daniel* himself and the heirs of his body, being an express estate tail to him, I can find no authority for saying that the intermediate vested life estates could be displaced by him. The case is like *Smith v. Clyfford* (b).

PATTESON J.—I have no doubt on this subject. The passages referred to in *Fearne* make it quite clear. After combating the notion (c) that the possibility of the freehold's determining in the life of the ancestor who takes it, makes the subsequent limitation to his heirs contingent, and prevents it from attaching in himself, he says that such subsequent limitation, whether it is mediate or immediate, always vests immediately in the ancestor, "with this distinction, that, where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession; but, where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the termination of the preceding mesne estates." The subsequent limitation then in this case is a remainder—a remainder on what? On the intermediate estates for life. Then follows the passage (d) in which Mr. *Fearne* says that, if the interposed estates are contingent, then, although the two mediate estates in the

(a) 7 T. R. 842.

(b) 1 T. R. 798.

(c) P. 38.

(d) P. 37.

1840.  
 ~~~~~  
 DOE  
*d.*  
 NICHOLSON  
*v.*  
 WELFORD.

ancestor shall coalesce, nevertheless, when the contingency happens, and the interposed estate comes into existence, the estates which have so coalesced shall open and let it in. If such estates are to re-open for the purpose of letting in an interposed estate which was contingent in the first instance, it can hardly be held that they are to keep closed so as to shut out that which was a vested remainder in the first instance. *Smith v. Clyfford*(a) is in favor of the plaintiffs. In *Venables v. Morris*(b) the person claiming was heir, and there does not appear to have been any question as to the estate of any intermediate remainderman.

WILLIAMS J. concurred,

Rule discharged (c).

(a) 1 T. R. 738.

(c) See Hayes' Conv. (4th ed.) 418.

(b) 7 T. R. 342.

WEDGEWOOD v. HARTLEY and another (d).

Trespass q.  
 c. f., and for  
 taking plain-  
 tiff's goods.

Plea: that  
*W.* was tenant  
 of the pre-  
 mises to the  
 defendants, at  
 a rent of 10*l.*  
 and that they  
 distrained &c.,

Replication:  
 Non tenuit.

The plain-  
 tiff's case at  
 the trial was,  
 that *W.* was  
 owner in fee  
 and had let to  
 him at a rent  
 of 2*l.*

**TRESPASS** for breaking plaintiff's close and taking his goods.

Pleas:—1. That plaintiff held as tenant to the defendants at the yearly rent of 10*l.*, and that they entered and distrained for rent in arrear. 2. That *Wedgewood*, the elder, (the plaintiff's father,) was tenant to the defendants on the same terms as in the first plea mentioned, and that they entered and distrained for rent in arrear.


Replications traversing the tenancy. Issues thereon.

At the trial before *Patteson* J. at the York spring assizes, 1838, the case set up by the plaintiff was, that he was tenant at a yearly rent of 2*l.* to his father, who was owner

(d) Decided (June 19) Trinity Term, 1839.

Held, that *W.* was not competent to prove this case, because he would be liable over to the plaintiff if he lost the verdict, and that the ground of incompetency was an interest in the result, and not merely in the verdict as an instrument of evidence.

in fee, and the wife of his father was called to support the case. She was examined on the *voire dire*, and stated that her husband had demised to the plaintiff, and was then objected to on the ground that, if the plaintiff failed, he would have a right to recover over against her husband. The learned judge admitted the witness, and the plaintiff had a verdict.

1840.  
  
 WEDGEWOOD  
 v.  
 HARTLEY.

*S. Temple*, in the Easter term following, obtained a rule nisi for a new trial on the above ground.

*Alexander* and *W. H. Watson* now shewed cause. They contended that the witness had no interest in the result, as her husband did not appear to have entered into any contract to indemnify the plaintiff, and that, even if such a contract were to be implied, the plaintiff, in the event of the defendants' succeeding would have a right to deduct the amount of rent he paid to them from the amount payable to his father; and that the verdict as an instrument of evidence could not possibly affect the witness. They cited *Doe d. Nightingale v. Maisey* (a), *Doe d. Lord Teynham v. Tyler* (b), and *Simpson v. Pickering* (c).

*S. Temple* contrà. If *Wedgewood*, the father, was not owner of the fee, but mesne landlord only, and, by not paying the rent due from him to the defendants, brought this distress upon the plaintiff, his immediate tenant, the plaintiff would have a remedy over against him. If, however, the father was owner in fee, then he would stand clear from liability to indemnify his son, because the distress would have been wrongful. The witness, therefore, had a direct interest in the result, which interest could not have been removed by indorsement on the record under 3 & 4 *Will.* 4, c. 42, s. 26: *Harding v. Cobley* (d).

(a) 1 B. & Ad. 439.

(b) 6 Bing. 390.

(c) 1 C., M. & R. 527.

(d) 6 C. & P. 664.



1840.

WEDGEWOOD  
v.  
HARTLEY.

LORD DENMAN C. J.—Under these pleadings the father had a direct interest to state that he did not hold of the defendants, for, if he did, he would be liable over to his son for the distress.

PATTESON J.—The witness was incompetent, not on the ground of interest in the verdict as an instrument of evidence, but of direct interest in the result of the present action. If the distress was rightful, the son would be damaged, because the rent distrained for was much larger than the rent he would have an opportunity of deducting against his father. The father, therefore, would be liable over.

WILLIAMS J.—The witness had a direct interest in shewing that her husband had not rendered the plaintiff liable to the distress.

COLERIDGE J.—If the terms of the tenancy of the plaintiff to his father had been set out, and had expressly provided for the father's liability over in a case like the present, it would hardly be contended that the witness would be competent, but I think enough is disclosed to establish the same point. The witness on the *voire dire* admits the letting by her husband to the plaintiff, and the plaintiff would undoubtedly have a remedy over against her husband, if the distress happened through his default. Even if the plaintiff had not paid his rent to his father, still there might be no opportunity of deducting, for the two rents might be payable at different periods.

Rule absolute.



1840.

Monday,  
June 8th.

## The QUEEN v. CAPEL, Clerk.

**CASE.** On appeal by the defendant to the quarter sessions for the liberty of St. Alban, in the county of Hertford, against a rate made for the relief of the poor of the parish of Watford, in the said liberty, the sessions confirmed the rate, subject to the following case :—

The assessment was made on all the houses, lands, shops, warehouses, wharfs, factories, and other buildings in the parish, including the dwelling-house of the appellant, on an estimate of the net annual value of the same, (that is to say) of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and deducting from such rent the probable average annual costs of the repairs, insurance, and other expenses, necessary to maintain them in a state to command such rent.

The appellant is the vicar of the parish, and receives compositions from the respective occupiers of land in the parish for the small tithes arising therein.

The gross annual amount of the compositions was 660*l.*, out of which average annual payments of 82*l.* 15*s.* are made by the vicar for tenant's rates and ecclesiastical dues, but the sum on which the vicar was assessed in respect of the said small tithes was 540*l.*, being such a rent or yearly sum as the said small tithes might reasonably be expected to let for from year to year, free of all usual tenant's rates and taxes, and deducting from such rent or yearly sum the amount of the ecclesiastical dues.

the sum which the said tithes might reasonably be expected to let for from year to year, free of all tenant's rates and taxes, and deducting from such rent the amount of the ecclesiastical dues.

The occupiers, from the capital, time, and skill employed in the cultivation of their lands, made a profit, which on an average amounted to two-thirds of the rent estimated above.

Held, that the rate followed the directions of 6 & 7 Will. 4, c. 96, s. 1, which apply to tithes as well as land, and that it could not be objected to on the ground that it was unequal, because the rent so estimated, on which the occupiers were rated, bore a smaller proportion to the profits of the land, than the sum at which the vicar was rated bore to the yearly value of his tithes.

The occupiers of lands were rated to the relief of the poor on an estimate of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and deducting from such rent the probable annual costs of the repairs, insurance, and other expenses necessary to maintain them in a state to command such rent, according to 6 & 7 Will. 4, c. 96.

The vicar, who received 660*l.* a year as a composition for small tithes, out of which he paid 82*l.* 15*s.* for tenant's rates and ecclesiastical dues, was rated on 540*l.*, as being

1840.

  
 The QUEEN  
 v.  
 CAPEL.

The great tithes of the parish, which were in the hands of a layman, were rated in a similar manner.

The occupiers of the lands in the said parish occupied at rack-rents, (that is to say) the full rents which the said lands were worth to be let. *Such occupiers employed capital in the cultivation of such lands, and applied their time and skill in superintending the same; and the profits derived from such cultivation were differently proportioned to the net annual value of the lands, estimated as above, in different cases; but, on an average of all the lands in the parish, the said profits amounted to two thirds of the net annual value or rent as estimated above.*

The occupiers of shops, warehouses, wharfs and factories in the parish, occupied at rack-rents, and carried on business of various kinds in their said premises, and made profits bearing different proportions to the net annual value of the premises occupied by them respectively in different cases; but such profits, on an average of the whole, were equal to the net annual value or rent of the said shops, warehouses, wharfs and factories, estimated as above.

The occupiers of some of the houses in the parish, including the appellant, carried on no business on such premises yielding any profits.

The appellant objected to the assessment as unequal and illegal, alleging that he was rated in a larger proportion to the full yearly amount of the clear profits of his tithes, and to the full yearly value of his dwelling-house, than the occupiers of lands in the parish, who were not rated enough in respect of their rateable ability as such occupiers; inasmuch as they were only rated to the amount of their rents, estimated as above, which was a smaller proportion of the profits derived from the land, than the said sum at which the said vicar was rated bore to the yearly value of his tithes; and that the said occupiers were not rated for any part of the remainder of their profits, which amounted on an average of the parish to two-thirds of their rents; and that the occupiers of shops, warehouses, wharfs and factories in the

parish were not rated high enough in respect of their rateable ability as such occupiers, inasmuch as the profits made from the business carried on in the same, which amounted to a sum equal to their rents, were not included in the estimate of the annual value thereof to such occupiers.

And he contended that such a reduction in the assessment on his tithes and dwelling-house ought to be made, as would bear a just proportion to the assessments made on the occupiers of lands, shops, warehouses, wharfs and factories, or that an increase on the assessments on the said occupiers, in respect of their ability as such occupiers, ought to be made in proportion to their profits respectively.

Sir *J. Campbell A. G., Wightman, Tomlinson, and Puller*, in support of the order of sessions (a). From the statement of the case it appears that the appellant objected to the rate on the ground that he was rated in a larger proportion to the clear profits of his tithes "than the occupiers of lands in the parish, who were not rated enough in respect of their rateable ability as such *occupiers*," and the rate is in fact made upon occupiers only, and consequently in respect of real property only. The liability, therefore, of these occupiers, in the independent character of *inhabitants*, and in respect of their personal property, has nothing to do with the present inquiry. It must be admitted, after *Reg. v. Lumsdaine* (b) that, notwithstanding the Parochial Assessment Act (6 & 7 Will. 4, c. 96), and the general practice adopted by common consent, the inhabitants of a parish are still legally rateable (c) according to their ability, in respect of the profits made by them as inhabitants. But, as no complaint is made of the omission of personal property, the only question is, whether this rate is equal between the appellant, as the owner of tithes, and the persons assessed as occupiers of land in the parish. He contends, that either

1840.  
The QUEEN  
v.  
CAPEL.


Argument for  
the occupiers.

(a) The case was argued in H. T. last (Jan. 22), before Lord Denman C. J., *Littledale, Williams and Coleridge Js.*

(b) 2 P. & D. 219.

(c) No longer so. See 3 & 4 Vict. 89.

1840.

  
 The QUEEN  
 v.

CAPEL.

Argument for  
the occupiers.

he ought not to be rated according to the rent which could be obtained for his tithes, or, if he is to be so rated, that the farmer, wharfinger and shopkeeper also must be rated according to the rent which could be obtained for the subjects of their occupation respectively, plus the profits they make. It is clear that the appellant cannot have relief in the shape of abatement of his own rate. What abatement on his rate would make the rate equal throughout the parish? The farmers, and "the occupiers of shops, warehouses, wharfs and factories," considered as classes, make profits in different proportions, as appears from the case itself; and the individuals of each class must also differ inter se in their amount of profits according to their respective outgoings, skill, or opportunity. Abatement of the appellant's rate will not meet the grievance, unless he is the only person overrated, or unless all other persons are underrated in the same degree with each other. How then is the alleged grievance to be redressed? The only alternative is, that every farmer, shopkeeper, and other occupier of real property, should be rated separately and individually according to the profits he makes upon the premises he occupies. But the parish officers have no machinery for arriving at any such result; it could only be attempted by an inquisitorial examination of the amount of capital employed, the returns made, and other particulars, and would be attended with all the inconveniences which have led to the practical exemption of personal property; and the least inaccuracy in any one instance would be a ground of appeal; for the rate must be equal, not only as between the classes of tithe-owners and land-owners, but as between all the different individuals of the same class.

It is submitted, that according to the whole current of authorities under the 43 *Eliz.* c. 2, which is silent on the subject, occupiers are to be rated according to the rent which can be had for the subject of their occupation. The 6 & 7 *Will.* 4, c. 96, adopts the rule as laid down by judicial decisions, and removes all doubt on the subject;

and there is nothing inconsistent with the rule, except particular expressions, which admit of explanation, in *Rex v. Joddrell* (a). The rent actually paid may not afford a true criterion; *Rex v. Skingle* (b); but, where it is a rack-rent, that is as much as can be reasonably paid by a tenant, it is the true criterion: *Rex v. Birmingham Gas Light Company* (c), *Rex v. Hull Dock Company* (d), *Rex v. Inhabitants of Lower Mitton* (e), *Rex v. Trustees of Duke of Bridgewater* (f), *Rex v. Tomlinson* (g), *Rex v. Liverpool Exchange* (h), *Rex v. Woking* (i). It may be said that these cases are not to be taken as authorities applicable to this case, because the tithe-owner was not before the Court. But in all of them, although the tithe-owner was not himself a party, yet others in the same situation with him were parties, and he was virtually before the Court as a party who contributed to the rate; and the Court would not have invariably laid down rent as the criterion, if it had been thought that profits were the criterion. In *Rex v. Trustees of Duke of Bridgewater* (f) the respondents stood in the same situation with the present appellant. The appellants, who were the trustees of the Bridgewater Canal, and in the receipt of tolls thereon, were rated upon their gross receipts minus their expenses, and they complained "that the profits arising from the occupation of farms and farming stock were either improperly omitted to be assessed according to the full value thereof, or were greatly under-rated in proportion to the tolls and income arising from the property of the defendants; and, lastly, that certain allowances and abatements, other than such allowances as were necessarily made to the defendants, in the management of their property, for

1840.  
  
 The QUEEN  
 v.  
 CAPEL.  
 Argument for  
 the occupiers.

(a) 1 B. & Ad. 403.  
 (b) 7 T. R. 549.  
 (c) 1 B. & C. 506; S. C. 2 D. & R. 735.  
 (d) 3 B. & C. 516; S. C. 5 D. & R. 359.  
 (e) 9 B. & C. 810; S. C. 4 M. & R. 711.

(f) 9 B. & C. 68; S. C. 4 M. & R. 143.  
 (g) 9 B. & C. 163; S. C. 4 M. & R. 169.  
 (h) 1 A. & E. 465; S. C. 3 N. & M. 550.  
 (i) 4 Ad. & E. 40; S. C. 5 N. & M. 395.

1840.

The QUEEN  
v.

CAPEL.

Argument for  
the occupiers.

collection, repairs, and every other attendant expense, were made as far as regarded the abovementioned persons and profits, by assessing them on the rent only, which were not made in the case of the defendants." The case was sent back to the sessions, not to ascertain the proportion that the rent paid by the farmers bore to their profits, and to rate the canal-owners in the same proportion to their receipts, but to ascertain the rents which the tolls would let for, *Bayley J.* saying, "the principle of our decision in this case is, that the same rule is to be applied to all occupiers, and that the rent or sum at which the land will let is the criterion of the value of occupation."

*Rex v. Brown.*

The appellant may, perhaps, rely on *Rex v. Brown (a)*. In that case, and in other cases also where casual expressions are to be found, which militate against the position contended for, it will be found that the distinction between rateability as occupier and rateability as inhabitant was not attended to, and any adverse expressions of the Court as to the rateability of a farmer's profits are not to be understood of the rateability of such profits in respect of the occupation of real property, but in respect of the parishioner's personal ability as an inhabitant. There the third ground of appeal was, "because *Thomas Langford* and four other persons (naming them) were omitted to be rated for and in respect of a dairy of cows, and the pasturage of lands in his and their respective occupations; although the said dairies and pasturages were situated, rented, occupied and enjoyed within the said parish; and although the same, or the occupiers thereof, in respect of the profits therefrom, were respectively rateable." It appeared that "the occupiers of several farms, who are rated to the poor for their respective farms, let their cows to an undertenant, called a dairyman, at a certain rent per cow; which cows, by the agreement, are exclusively depastured on different grounds belonging to the occupier of the farm, at different

(a) 8 East, 528.

times of the year, he being obliged to feed and maintain them without any expense to the dairyman. That the dairyman makes a profit of the milk and produce of such cows, independently of the profit made by the tenant of the farm." The sessions held that the dairymen were not rateable, and their judgment was affirmed by the Court. Lord *Ellenborough* C. J., in giving his judgment, thus expressed himself:—"The appellant complains of the rate without shewing any grievance; because the farmer having been rated, as we must presume, for the full profits of the farm, it matters not to the appellant whether or not the rate in respect of that farm could have been better distributed, by laying one portion of it on the farmer, and another portion on the dairyman; the appellant's proportion of the rate would remain the same in either case. It is said, that the interest which the dairyman takes under such an agreement is a tenement in law, and gives him an interest in the land, by which he may gain a settlement; and that I do not dispute: and therefore if the dairyman, considering him, and not the farmer, as the occupier of so much of the farm as the cows were depastured upon, had been rated as such for it, I do not see what objection could have been made. But here the objection is, that the farmer is rated for the whole farm, the profits of which arise principally from the stock upon it; and a part of those profits are again required to be subjected to another rate in the hands of the dairyman. But there is no objection to the rate as it now stands; and great inconvenience would ensue if the profits of different persons out of the same farm were subdivided, and a proportionable rate laid upon each, instead of one general rate for the whole on the general occupier of the whole." Undoubtedly particular expressions in this judgment may be pressed to shew that a farmer is rateable for his profits. But, without dwelling upon *Rex v. Barkin* (a), where it was held that a farmer is not rateable for his stock, although a tradesman is, and 16 *Vin. Abr.* (Poor E.) to the same effect,

1840.

The QUEEN  
v.  
CAPEL.

Argument for  
the occupiers

*Rex v. Brown.*

(a) 2 *Ld. Raym.* 1280.



1840.

*The QUEEN*  
v.  
CAPEL.  
Argument for  
the occupiers.

*Rex v. Joddrell.*

it is sufficient to say that the decision in *Rex v. Brown* (a) was merely that there was no necessity for rating the dairyman, and that the distinction between the farmer's liability for profits as an occupier and as an inhabitant was never referred to.

The only other authority which can be drawn into the service of the appellant is *Rex v. Joddrell* (b). With respect to this case it is submitted that the statement of the special case and the judgment thereupon, if taken together, do not support the doctrine contended for by the appellant; that, if they do support such a doctrine, the authority is at variance with all previous decisions and with the subsequent case of *Rex v. Adames* (c), and cannot be maintained; and that the 6 & 7 Will. 4 has removed all doubt upon the question, and has settled it conclusively against the appellant.

It may appear hard that the clerical titheowner, to whom tithes are rendered as a compensation for services, should be rated on the same principle as the lay impropriator, but the 43 Eliz. has made no distinction. In *Rex v. Joddrell* (b) on the part of the appellant it was proved, and on the other part not disputed, that the assessment for the rate appealed against was made on the bonâ fide amount of the rack-rent which the farms were letting at, and were worth to let at the time. The rector, the appellant, was "assessed in the sum of 368*l.*, in respect of the gross payments for compensation for tithes amounting to 452*l.* 2*s.* 0½*d.*; and the deduction in the assessment allowed the rector, 83*l.* 2*s.* 0½*d.*, was the amount of parochial dues levied on the 452*l.* 2*s.* 0½*d.*" It was objected by the appellant, "that as he was assessed at such a sum as, with his poor-rate, made up the full gross amount of corn rent, the profit accruing to the occupiers beyond the amount of rent paid, and beyond the amount of the interest of the capital employed, and of expense of cultivating lands, including compensation for the farmer's trouble and labour, and superintendence, ought to have

(a) 8 East, 528.

(b) 1 B. &amp; Ad. 403.

(c) 4 B. &amp; Ad. 61; S. C. 1 N. &amp; M. 662.

been included in these assessments; and the appellant proposed to call evidence to prove the existence of such profit so accruing generally; the respondents, however, admitted such profits to have accrued generally." On this objection the judgment of the Court was delivered by *Parke J.* in the following terms:—"The second objection was, that the farmer's share of profit ought to have been rated, or, which is the same thing, that the appellant should have been rated proportionably less; and that objection should, in our opinion, have prevailed. Of the whole of the annual profits, or value of land, a part belongs to the landlord in the shape of rent, and part to the tenant; and whenever a rate is according to the rack-rent (the usual and most convenient mode), it is, in effect, a rate on a *part* of the profit only. It must, therefore, in the next place, be ascertained what proportion the rent bears to the total annual profit or value, and that will shew in what proportion all other property ought to be rated. If, for instance, the rent is one-half or two-thirds of the total annual profit or value of land, the rate on all other property should be on a half or two-thirds of its annual value. In this case it is clear that there was a share of profit received by the tenant upon which there has been no rate, and, in that respect, the farmers were assessed in a less proportion of the true annual profit or value than the appellant. The sessions were therefore wrong in disallowing this objection, and they ought to ascertain the ratio which the rent of land bears to its average annual profit or value, and assess the appellant for his tithe rent in the same ratio."

If by the "farmer's share of profit" in this judgment is to be understood all that is made by the farmer beyond his rent, then the case is inconsistent with all previous authorities. On the same principle tradesmen and professional men must be rated not according to the rack-rent paid by them as occupiers, but according to their amount of business. It will not be enough to ascertain "the ratio which the rent of land bears to its *average* profit," for an average

1840.

The QUEEN  
v.  
CAPEL.

Argument for  
the occupiers.

*Rev. Joddrell.*

1840.

The QUEEN  
v.

CAPEL.

Argument for  
the occupiers.

*Rex v. Joddrell*

would produce inequality among individuals, and to ascertain the facts in individual cases would be impossible. Again, it is said, "in the case of land, the rateable value is the amount of the annual average profit or value of the land, after every outgoing is paid, and every proper allowance made; not, however, including the interest of capital, as the sessions have done, for that is part of the profit."

This part of the judgment goes beyond the case, for the appellant had expressly excluded the interest of capital from the amount, on which he contended the farmer was to be rated; and if the interest of capital employed upon land is to be universally considered as rateable profit in the hands of the occupier, and interest of capital is not rated when otherwise employed, the effect will be that land will be thrown out of cultivation. If a tenant borrows money for the purpose of farming, it is clear that the interest is no profit, for he must pay interest before he derives any profit from his occupation. The whole judgment, however, will be made consistent with other authorities by reading it with the statement of the special case, instead of laying undue stress upon particular expressions. The interest of capital may be rateable if it arises from capital sunk in permanent improvements upon the land, for then the capital has become amalgamated with the land, and has increased the value of the land itself. If "interest of capital" is understood in this way, the case goes no farther than *Rex v. St. Nicholas, Gloucester* (a), where the profits of a weighing machine fixed to the freehold were held rateable, and the similar cases of *Rex v. Atwood* (b) and *Rex v. Lord Granville* (c). Any permanent improvement of a farm under lease would enable the landlord to command a higher rent than before the improvement; the lessee, therefore, as the value of the land is to be estimated in its improved condition, has his farm at an under rent, and this may be the farmer's share of

(a) 1 T. R. 723, n.

(c) 9 B. &amp; C. 188; S. C. 4 M.

(b) 6 B. &amp; C. 277; S. C. 9 D. &amp; R. 171.

&amp; R. 328.

profit that is spoken of in the judgment. The case itself is ambiguously stated, and is quite consistent with this supposition. It is said that the "rate" was made on the bonâ fide amount of the rack rent, which the farms were letting at and were worth to let at the time. This statement may at first sight convey that the farmers were then paying as large a rent as could be obtained for their farms at the time of the rate. But it is quite consistent with this statement that the farms were not only worth the rent, but a good deal more, and that, though originally let at a rack rent, they had since improved in value, so as to be worth more than the rent. This increase in value would be a profit from the land, and would be properly termed "the farmer's profit." Again, it is stated that the appellant objected that "the profit accruing to the occupiers *beyond* the amount of *rent* paid, and beyond the amount of the *interest of capital*, and of *expense of cultivating* lands, including *compensation* for the farmers' trouble and *superintendence*, ought to have been included in these assessments; and the appellant proposed to call evidence to prove the existence of such profit so accruing generally; the respondents, however, *admitted such profits* to have accrued generally." This language is strongly in favour of the construction already put upon the words "interest of capital" in the judgment, for "interest of capital" is in the case itself spoken of as something distinct from the capital expended in cultivation, and probably therefore means capital expended in permanent improvements. The same passage in the case shews also from the rest of its terms that the farmers did not pay an adequate rent, and thus that they had from the land itself a profit which was the proper subject of rateability. For what was that which is stated to have accrued to the occupiers beyond the *rent* paid, *interest of capital*, *expense of cultivating*, and *compensation* for trouble, &c.? The farmer is content with a return which covers his rent, interest of capital, and compensates him for his labour. This return constitutes the profits upon which he lives, and with which he

1840.

The QUEEN  
v.

CAPEL.

Argument for  
the Occupiers.

Rev. Joddrell.

1840.

**The QUEEN  
v.  
CAPEL.**

Argument for  
the Occupiers.

is satisfied. If any thing therefore accrues to him *beyond* these profits, he has his farm at an under-rent; he receives a surplus profit, which is in truth part of that "net-rent" which is laid down in the authorities, and in the 6 & 7 *Will.* 4, c. 96, as the amount on which the rate is to be imposed.

*Rex v. Adames.*

The case of *Rex v. Adames* (a), in which *Parke J.* also delivered judgment, shews that the Court did not intend in *Rex v. Joddrell* (b) to break in upon the criterion of rateability, as established by all previous cases. In *Rex v. Adames* the question was, whether the occupier of land subject to a sewers' rate to protect it from floods, was rateable at the same sum as the occupier of similar lands which were not subject to the sewers' rate. The decision was, that a deduction was to be made for the sewers' rate, and it was said, "the cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates, charges and outgoings," and the authorities already cited, and *Rex v. Joddrell* itself, are referred to in support of this rule. One passage in this judgment may be adduced in favor of the appellant—"in practice it is usual and it is most convenient to rate lands at the rack rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges and outgoings, which is in effect rating according to a part of the net profit only; but, provided it be the same aliquot part in all cases, it makes no difference." In one sense, certainly, a rate upon the rack rent is a part only of the profit, but the question is, whether a rate upon the residue of such profit can be laid upon the farmer, as *occupier*, instead of as *inhabitant*. The rule, as expressed by the judgment, shews that the rate

(a) 4 B. & Ad. 61; S.C. 1 N. & M. 662. (b) 1 B & Ad. 403.

cannot be so laid, and construes *Rex v. Joddrell* in the way contended for by the respondents. If, therefore, *Rex v. Joddrell* is inconsistent with this rule, it is clear that the Court did not abide by that authority.

Lastly, the rule, which had previously been prescribed by this Court, is now unquestionably settled by the adoption of it by the legislature in its very terms. The 6 & 7 Will. 4, c. 96, s. 1, enacts that no rate shall be allowed by the justices "which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all tenants' rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Thus all hereditaments, whether land or tithes, are to be rated according to one uniform rule, which has been followed in this case. The profits of the farmer are excluded from the criterion; it is to be furnished by the amount of rent which can reasonably be obtained, and by nothing else.

The appellant may rely upon the proviso concluding the first section of the act, "provided always, that nothing herein contained shall be construed to alter or affect the principles or different liabilities, if any, according to which different kinds of hereditaments are now by law rateable." But this proviso cannot apply to tithes, because they were not, before this act, rateable on any different principle from other hereditaments. Whether rent or profit was the true principle of rateability, it was the same principle at all events that was in force both with respect to land and to tithes, and this case cannot come within the proviso, which embraces only such subjects of rating as were under different relative liabilities. The proviso was probably intended to preserve the exemptions made in favor of land taken for public works, as in *Rex v. Grand Junction Canal Com-*

1840.

The QUEEN  
v.

CAPEL.

Argument for  
the Occupiers.6 & 7 Will. 4,  
c. 96.

1840.

The QUEEN

v.

CAPEL.

Argument for  
the Tithe-  
owner.

*pany (a)*, by various local acts, which have enacted that such land shall not be rated on its improved value.

Sir *W. W. Follett, Moody and Hodges* contra. It is not proposed, on behalf of the appellant, to discuss that part of the case which relates to the mode of rating shopkeepers and wharfingers, for the profits made by them are altogether distinct from the subject-matter of their occupation. The appellant complains only that the rate is unequal as between him and the occupiers of land, because he is rated nearly to the full value of his tithes, and the occupiers are not so rated. The question will first be considered independently of the 6 & 7 *Will.* 4, c. 96, and then with reference to that statute.

It has been assumed that, if *Rex v. Joddrell (b)* is adverse to the respondents, it has innovated upon the established law. But it will be found that the doctrine, in favor of the appellant, in that case is consistent with all prior authorities. The occupiers of land were always liable to be rated for its full value, and the rack rent, although adopted as a convenient criterion, is only a part of that value. When the 43 *Eliz.* passed it was not usual to hold land at rack rent; that statute applies equally to all occupiers, whether owners or lessees, and in either case they were rateable according to their ability upon the full value of their land. Sir *Anthony Earby's* case (c) decided that the landlord was not rateable for the rent received by him, because the occupier was already rated for the full value of the land. So in *Reg. v. Barkin (d)*, which is explained in *Rex v. Ringwood (e)* and other authorities, it was held that the tradesman was rateable for his stock, but the farmer was not. The distinction proceeded on the very ground that the farmer was rated, as occupier, for the full value of his land, and that, as part of that value arose from the stock employed on the land, if he was rated as occu-

(a) 1 B. &amp; Ald. 289.

(b) 1 B. &amp; Ad. 403.

(c) 2 Bulst. 354.

(d) 2 Ld. Raym. 1280.

(e) Cowp. 327; and see 16  
Vin. Abr. (Poor E).

pier, for the value of his land, and then as inhabitant for his stock, he would be rated twice for the same thing, whereas, the stock of the tradesman being in its nature unconnected with the subject of his occupation, he might well be rated, first, as occupier, for his shop, and again, as inhabitant, for his stock. It was, therefore, because the farmer, as occupier, was rateable not upon the rent only, but upon his whole profits, that his stock was exempted. It was not until a more recent period that the rent which the land is worth was treated as the criterion of value, and it has never, even since that criterion was adopted, been decided that such rent was the full value, but merely that, if all are rated according to the same criterion, the rate is good, because it is equal and nobody can complain. In *Rex v. Brown* (a) also it was taken for granted that the whole profits of the farm were liable, and the profit made by the dairyman was held not liable, because it had already been rated in the hands of the farmer. The objection was, "that the dairyman makes a profit of the milk and produce of such cows, independently of the profit made by the tenant of the farm." The argument was, "that to rate the dairymen, in respect of the profit which they make of the milk of the cows, is in effect to rate the profits of the land twice; once in the hands of the farmer or occupier of the land in respect of the value of his farm, &c., and a second time in the hands of the dairyman, in respect of the profit of the stock on the farm; the value derived from which stock constitutes a principal part of the value of the farm itself, and without which the profit of the farmer would be greatly diminished. It is impossible to distinguish the value of the cows from that of the farm itself, on which they depend for their subsistence. Upon a dairy farm the profit of the land is derived through the medium of cows." The argument is adopted by Lord *Ellenborough* C. J., as appears from the passage already cited by the respondents. Throughout the case it is assumed that the farmer is rate-

1840.

The QUEEN  
 v.  
 CAPEL.

Argument for  
 the Tithe-  
 owner.

*Rex v. Brown.*

(a) 8 East, 528.



1840.

The QUEEN  
v.  
CAPEL.

Argument for  
the Tithe-  
owner.

able for the whole value, and not simply upon the rent, Lord *Ellenborough* C. J. saying "the farmer having been rated, as we must presume, for the full profits of the farm," &c. The respondents have attempted to explain the judgments in that case, which contain many expressions unfavourable to them, by the supposition that the Court did not advert to the distinction between rateability as occupier and as inhabitant. But there is no ground for such a supposition, nor does it appear that personal property was rated in the parish. *Lord Bute v. Grindall* (a) decided that, where there was a profit in the hands of the ranger of a park, as occupier under the crown, distinct from the profit belonging to the crown, he was rateable for it. This case and *Rowls v. Gells* (b) illustrate the doctrine that the whole profit of land, to whomsoever accruing, is to be reached wherever it is practicable; and *Rex v. Bishop of Rochester* (c), *Rex v. Gardner* (d), *Rex v. Mast* (e), *Rex v. Stafford and Worcester Canal Company* (f), *Rex v. Munday* (g), *Rex v. Attwood* (h), *Rex v. Wistow* (i), and *Reg. v. Guest* (k), all contribute, more or less, by the language to be found either in argument or judgment, to shew what has long been the general understanding on the subject. There is also a passage in 1 *Nolan's P. L.* 224 (l), which is most important for the same purpose. "More difficulty," he says, "arises in determining by what method the present value is to be ascertained. In the case of lands and houses the rate is usually imposed in one of three ways: 1. upon the actual rack rent, when they are in the hands of a lessee; 2. on a supposed rent founded on valuation; which is done where they are occupied by the proprietor, or by a tenant who pays less rent than the

(a) 1 T. R. 338; S. C. in error,  
2 H. Bl. 265.

(b) Cowp. 451.

(c) 12 East, 355.

(d) Cowp. 83.

(e) 6 T. R. 154.

(f) 8 T. R. 340.

(g) 1 East, 588.


(h) 6 B. & C. 277; S. C. 9 D.  
& R. 328.

(i) 5 A. & E. 259; S. C. 6 N.  
& M. 567.

(k) 7 A. & E. 951; S. C. 2 N.  
& P. 663.

(l) 4th ed.

premises are worth; 3. on an annual per centage calculated upon the purchase money, with a just allowance for necessary outgoings. All these modes of valuation proceed upon the assumption that the rack rent is the criterion of that actual value upon which the tax is laid; but this principle is fallacious; rent being only so much of the actual value as the tenant can afford to pay his landlord, deducting the expense of cultivation, and a reasonable remuneration for trouble and time. The rent therefore is the landlord's profit, the reasonable remuneration is the tenant's profit. *Both come from the land, and form parts of its productive value.* When land is occupied by the proprietor he receives both these profits, when it is demised to a tenant they are divided." This is precisely the principle of *Rex v. Joddrell(a)* and of the present appellant's complaint. *Rex v. Joddrell.*

1840.  
  
 The QUEEN  
 v.  
 CAPEL.  
 Argument for  
 the Tithe-  
 owner.

*Rex v. Joddrell(a)*, therefore, contains no new doctrine. Suppose the owner of the land to be himself the occupier, he would be rateable for all the gross profits of the land, deducting only the expenses of cultivating it and other outgoings; he would be rateable not only for the rent which a tenant would pay him, but for something more. The circumstance that the land is occupied by a tenant instead of by the owner, makes no distinction under the statute of *Eliz.*; taking the produce to be the same in both cases, the same amount of profits will be subject to the rate. In *Rex v. Joddrell(a)* it was argued that tenants were not to be rated for their profits, and *Rex v. Bridgewater(b)* was cited; the Court took a different view, and it was decided "that there was a share of profit received by the tenant, upon which there has been no rate, and in that respect the farmers were assessed in a less proportion of the true annual profit or value than the appellant. The sessions were therefore wrong in disallowing this objection, and they ought to ascertain the ratio which the rent of land bears to its average annual profit or value, and assess the appellant for his tithe-rent in the

(a) 1 B. & Ad. 403.

(b) 9 B. & C. 68; S. C. 4 M. & R. 143.

1840.

The QUEEN  
v.

CAPEL.


Argument for  
the Tithe-  
owner.*Rex v. Joddrell.*

same ratio." It was said that the meaning of the "farmer's share of profit," which was held rateable, was to be ascertained by referring to the "interest of capital," which is treated as part of this profit; that it was obvious that the allusion was to capital expended in permanent improvements, by which the value of the land had become greater than the rent. But it appears distinctly that the rent was a rack rent, and the judgment is distinct that there is a profit of the land beyond the rent, and that the farmer is rateable not only for the rent, but for the profit beyond the rent. It cannot, indeed, be reasonably supposed that farmers are occupying land throughout the country for the sake of getting only the ordinary interest of capital and remuneration of labour. In the present case, the average profit of the farmers is found to be two-thirds of the net annual value or rent, that is, if the tenant's rent is 300*l.* a year, his profit is 200*l.* more. Yet he is rated upon 300*l.* only. How is the rate laid upon the appellant? His tithes are worth 577*l.* a year, after the outgoings are deducted, and he is rated upon 540*l.* He, then, is rated on nearly the full value, and the farmer on two-fifths only of the full value, so that the rate is grossly unequal. There may be great practical difficulty in ascertaining the full value of the land, but the difficulty of making a valid rate cannot relieve the occupier from his liability any more than the owner of personal property. If the 6 & 7 Will. 4, c. 96, prohibits the rating of land at its full value, why are tithes to be so rated? The existence of certain taxable profits beyond the rent which can be had for land, was recognized in 43 Geo. 3, c. 122, by which, for every 20*s.* value of land, the owner was charged 1*s.*, and the occupier 9*d.* for every 20*s.* annual value, and if the same person were owner and occupier he was charged the whole 1*s.* 9*d.*

*Rex v. Adames.* *Rex v. Adames* (a) supports *Rex v. Joddrell* (b), as appears from the passage in the judgment referred to by the respondent.

(a) 4 B. & Ad. 61; S. C. 1 N. & M. 669.  
(b) 1 B. & Ad. 403.

ents, and from other passages also. The tenant's share of profit is spoken of as something distinct from the landlord's share, and rent is stated not to be the true criterion of the annual value to the occupier. The principle on which the decision is founded is stated to be that the rate must be equal; and it is said that rating upon a rack rent is rating upon part of the net profit only, but that if the same aliquot part is taken in all cases the rate is good. *Rex v. Birmingham Gas Company (a)*, *Rex v. Trustees of Duke of Bridgewater (b)*, *Rex v. Woking (c)*, *Reg. v. Cambridge Gas Light Company (d)*, and some expressions of *Parke J.* in the course of the argument in *Rex v. Oxford Canal Company (e)*, support the same doctrine, that you may legally rate at more than the rack rent, and that this rent is a convenient criterion, and nothing more, but that at all events the rent must be equal.

1840.  
  
 The QUEEN  
 v.  
 CAPEL.  
 Argument for  
 the Tithe-  
 owner.

*Rex v. Adams.*

The remaining question is, whether the 6 & 7 Will. 4, c. 96, affords any answer to the appellant's complaint, that he is rated unequally in relation to the occupiers of land. The act does not appear to have been drawn with legal accuracy, or even to use legal terms in their legal signification, and in such a case the Court will not confine them to their legal signification: *Colebrooke v. Tickell (f)*: the first section speaks of "hereditaments rated thereunto," whereas they are not rated; the rate being a personal charge, the clause must be read "persons rated thereunto." For the respondents it has been contended that the tithes as well as lands are required to be rated on their value to let, and that the present rate complies with the statute. But tithe clearly is not a hereditament within the meaning of the clause. The deductions "of the repairs, insurance, and other expenses necessary to maintain them in a state to command

(a) 1 B. & C. 506; S. C. 2 D. & R. 735.

(b) 9 B. & C. 68; S. C. 4 M. & R. 143.

(c) 4 A. & E. 52; S. C. 5 N. & M. 395.

(d) 8 A. & E. 73; S. C. 3 N. & P. 262.

(e) 10 B. & C. 163; S. C. 5 M. & R. 100.

(f) 4 A. & E. 916; S. C. 6 N. & M. 483.

1840.

The QUEEN  
v.

CAPEL.

Argument for  
the Tithe-  
owner.6 & 7 Will. 4,  
c. 96.

such rent," cannot apply to tithes, nor can the form of rate given in the schedule. The clause relates to one species of rateable property only, viz. lands and houses, and the object was to establish in all parishes one uniform mode of rating that particular class of rateable property. It has already been decided that the act does not apply to personal property, *Reg. v. Lumsdaine*(a); nor does it apply to tithes. *Reg. v. Lumsdaine*(a) also recognized *Rex v. Joddrell*(b), and decided that the principles of rating remained unaltered: the great principle being equality. Now if the occupier is to be rated on the rent only, and the tithe-owner on the full value, that principle is violated, and no effect is given to the proviso which especially enacts that the relative liabilities between "different kinds of hereditaments" is not to be altered. The proviso was necessary, because before the passing of the act both land and tithes were rateable on their full value, so that the previous part of the section, which makes land rateable on the net rent only, and is silent as to tithes, would have introduced an inequality of rating as between them, by leaving tithes still to be rated upon their full value according to the old law, if this consequence had not been obviated by the proviso. The construction which the respondents put upon the proviso, contending that it merely keeps alive the enactments in local acts, by which land taken by gas or canal companies was to be made rateable, not on the improved value given to it by its special application to profitable works, but on its original value as ordinary land, gives no effect whatever to the words "different kinds of hereditaments," for one piece of land is not a different kind of hereditament from another, whereas land is a different kind of hereditament from tithes. In point of fact, it is well known that the proviso was introduced by the Archbishop of Canterbury, for the very purpose of protecting tithes and keeping alive the same relative liability to the poor rate between them and land, which the appellant now relies upon.

*Cur. adv. vult.*

(a) 2 P. &amp; D. 219.

(b) 1 B. &amp; Ad. 403.

Lord DENMAN now delivered the judgment of the Court as follows :—This was an appeal against a rate made for the relief of the poor of Watford. The sessions confirmed the rate, subject to the opinion of this Court upon a case stating the assessment to have been made on all the lands, houses, shops, warehouses, wharfs, factories and other buildings, on an estimate of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and deducting from such rent the probable annual cost of the repairs, of insurance, and other expenses, necessary to maintain them in a state to command such rent. The vicarage or dwelling-house of the appellant is stated to have been rated thus. It further appears that the appellant, as vicar of the parish, receives compositions for small tithes from the occupiers of land, the gross annual amount of which was 660*l.*; but the assessment upon the appellant was for 540*l.*, after deducting 82*l.* 15*s.* for tenants' rates and ecclesiastical dues; the said sum of 540*l.* being such as the small tithes might be reasonably expected to let for from year to year free of all tenants' rates and taxes, and deducting from such rent the amount of the ecclesiastical dues.

Upon this state of facts the argument before us extended over a very wide range, comprehending an examination of almost all the cases ancient and modern touching the rateability of property. In our view, however, it is neither necessary nor useful to pursue the same course, because this rate strictly complies with the enacting part of 6 & 7 *Will.* 4, c. 96, s. 1, and if that embraces tithes as well as land, and if the proviso at the end does not interfere, that rate will be good, even though it could not be sustained on the principles laid down in former decisions.

Now it cannot be questioned that the words used in the enacting part are large enough to embrace tithes; "hereditaments" is the division under which a lawyer would class tithes: the expressed object of the statute is to break down distinctions and establish uniformity of rating; and the rule

1840.

The QUEEN  
v.  
CAPEL.

1840.

  
 The QUEEN  
 v.  
 CAPEL.

which it propounds is thus far applicable to tithes—that they are demisable at a yearly rent. It is indeed true that many of the deductions required to be allowed from the rateable value are not commonly, and others perhaps cannot be, incident to tithes. But, as they are incident to other hereditaments, the expression of all such deductions was necessary, and indicates no intention to exclude any species of hereditaments. The form of rate given in the schedule was also relied on, which certainly cannot be strictly followed with regard to tithes; but, besides that the second section, which prescribes it, by no means requires that this shall be the only form of rate, the argument would prove too much, for it would exclude tithes from the rate altogether, as it was unsuccessfully argued that it excluded personal property in the late case of *Reg. v. Lumsdaine* (a).

But, supposing tithes to be within the enacting part, it was strongly contended that they must also be within the proviso—"that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable." We were pressed with a history of the introduction of this proviso into the bill in its passage through parliament; of such facts, if capable of being ascertained, we are not permitted judicially to take notice. The law must ever be interpreted by the general rules of construction, and we cannot travel out of its language in search of any supposed intention.

This language it must be owned is very inartificial and loose to a degree, which renders the discovery of a definite meaning to all its parts extremely difficult. To speak of the principles on which rating has proceeded is intelligible; but we also have to deal with "the different relative liabilities to which different kinds of hereditaments are liable." If "principles" and "liabilities" are intended to express the same thing, tithes are not within the proviso, for the titheholder was never rateable on any principle different

(a) 2 P. & D. 219.

1840.

The QUEEN  
v.  
CAPEL.

from the landholder. If there be one point as to which the spirit of all the decisions is uniform, it is that the rate must be adjusted on the principle of equality. The Court possibly has not in every instance worked out its purpose successfully, but the object has never been lost sight of; and the Court has constantly laboured to find out the net annual produce, after making proportionally equal deductions. In the instances where the Court may have failed to do this, the failure has been principally caused by the general practice (prohibited by the late statute), of rating on aliquot parts of the value, instead of the whole, and the consequent difficulty of dividing the burden between various kinds of property, and in a great degree by the ambiguous and fluctuating sense of many terms necessarily employed in speaking of the subject-matters of the rate.

Viewing, then, the decisions according to their avowed intention, and not with a minute reference to particular expressions, we find no variety in the principles of rating. But the word "liabilities" is supposed to go much further, and to set up the doctrine of *Rex v. Joddrell* (a), to the extent of shewing that land and tithes are under "different relative liabilities," which difference the proviso meant to leave untouched.

On this much canvassed decision we cannot refrain from making some few remarks. 1. It neither introduced nor affected to introduce any new law; on the contrary, the Court cited it in the later case, *Rex v. Adames* (b), as a recognition of the old principle to which we have alluded. 2. The tithe owner had not been allowed any deduction beyond the parochial rates, which he paid on the gross amount of the corn rent substituted for his tithes; either, therefore, he was not rated on the principle of what his own corn rent was worth to let, after the usual tenants' deductions, or it was assumed, contrary to the fact, that the corn rent would let for exactly its gross amount, deducting only the parochial

(a) 1 B. &amp; Ad. 403.

(b) 4 B. &amp; Ad. 61; S. C. 1 N. &amp; M. 662.



1840.  
  
 The QUEEN  
 v.  
 CAPEL.

rates. On the other hand, the respondents, the land occupiers, were rated on their actual rents, although it was admitted that a profit accrued to them, from the occupation, beyond the rent, the interest of capital employed, expenses of cultivation, and compensation for trouble, labour and superintendence. They, therefore, were rated on their rack rent, but it was a rent manifestly below that which the land was annually worth. The sessions, therefore, in effect found that the tithe composition was rated at its yearly value, and the land below its yearly value, and *Rex v. Skingle* (a) would be an authority to shew that the appeal was properly sustained.

The language of the Court in that case must be admitted to go further. It appears to lay down a rule of general application, and of great importance. This sentence occurs at p. 408: "Of the whole of the annual profits or value of the land a part belongs to the landlord in the shape of rent, and part to the tenant; and whenever a rate is according to the rack rent (the usual and most convenient mode) it is, in effect, a rate on part of the profit only." Now this important sentence expresses no general proposition of law, nor any conclusion of fact from any premises stated in the case; it is an assumption in the most general terms upon a point much questioned by those who have made such matters their peculiar study. It is certainly inconvenient to make such an assumption; the very terms "profit" and "value," used as synonymous, raise arguments as to their meaning, and the whole proposition is controverted. It might be urged, with as much show of reason, that the rack rent is the consideration which it is worth while to give beyond the rates, charges and outgoings, for the right to occupy and take the actual produce, and must always represent the net annual value beyond those outgoings, and beyond a fit compensation to the tenant for his risk, labour, and superintendence. According as land may be made pro-

(a) 7 T. R. 549.

deductive at more or less charge the rent which may be commanded for the occupation, in other words, the net annual value, will be more or less near to the gross; still this will not shew that a rate made on the rack rent in all cases will be unequal, because whatever is beyond the net annual value is not properly the subject of the rate.

1840.  
  
 The QUEEN  
 v.  
 CAPEL.

In this part of the argument one consideration is supposed to be of the utmost weight. If the landlord held the farm in his own hands, the annual value would consist of the amount of rent for which it might be let, with the addition of the tenant's profit. He would, in that case, have nothing to deduct but the ordinary outgoings and his bailiff's wages; but who shall say that these wages might not be equal to the estimated profits of the tenant; or, in the simpler case of the owner being entirely his own manager, that his personal labour, withdrawn from other profitable occupation, was not of equal value? As a proposition of law we cannot assert this, nor as a fact deducible from scientific axioms too clear for controversy. That discussion we purposely decline, preferring to say merely that *Rex v. Joddrell* (a) does not convince us that there was any difference in the legal liabilities of the tithe owner and the occupier of land.

If any case shall arise in which the facts shew that the rule, though formally applied according to the statute, will work injustice to the tithe owner, there will be no more difficulty in relieving him, than in relieving one landowner as against another; but the facts of this case call for no such interposition.

It was suggested that in this view of the case the proviso will have no operation. We are not quite sure that it will, as the attempt to apply it to special modes of rating prescribed by some local statutes did not appear very successful; but this doubt grows out of the language of the proviso itself, which expressly avoids to state affirmatively that there

(a) 1 B. & Ad. 403.

1840.

The QUEEN  
v.  
CAPEL.

are any cases to which the proviso can apply. Certainly something much more decisive was requisite to defeat an enactment so simple, practical, and useful.

Order of Sessions confirmed.

June 21st.

Where, after a return, to a fi. fa., that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return.

HOLMES v. CLIFTON, Esq. (a)


CASE against the sheriff of Lancashire for falsely returning to a writ, indorsed to levy 1105*l.* debt and 4*l.* costs of the goods of *L. M.*, that he had levied 160*l.*, and had detained 6*l.* 10*s.* for poundage; that he had the balance ready to render to the plaintiff, and that *L. M.* had no more goods whereof the residue of the debt could be levied.

Plea: that the defendant had made of the goods of the said *L. M.* the sum of 160*l.*, and then detained thereout the sum of 6*l.* 10*s.* for poundage and expenses, and then returned the said writ in the terms in the declaration mentioned, and then had the sum of 153*l.* 10*s.* residue of the said sum of 160*l.*, after deducting thereout the said sum of 6*l.* 10*s.* for poundage and expenses, to render to the plaintiff as in the said return is mentioned. That the plaintiff *accepted* the sum of 153*l.* 10*s.*, and the said sum was then paid to him for and on account and in and towards payment and satisfaction of the said debt and damages in the said declaration and in the said writ mentioned. And the plaintiff thereby waived and relinquished all cause of action against the defendant by reason of the premises. Verification.

Replication: that the plaintiff accepted the said sum of 153*l.* 10*s.* and the said sum was paid to the plaintiff for and on account and towards payment and satisfaction of the said debt or damages, but not in payment or satisfaction of the said debt and damages, in manner and form as the defendant hath alleged.

(a) Decided in Trinity term, 1839.

Special demurrer to the replication, on the ground that the replication did not traverse any material allegation contained in the plea, but that it traversed an immaterial allegation, and also that by the replication all the material parts of the plea were admitted and confessed without any avoidance thereof.

1840.  
  
 HOLMES  
 v.  
 CLIFTON.

Joinder in demurrer.

*Knowles* in support of the demurrer. *Beynon v. Garrat* (a) is an express authority, that a creditor by accepting part of his debt under the return precludes himself from bringing an action for a false return. The principle is, that a party shall not question a proceeding under which he has chosen to take a benefit, and is illustrated by *Watson v. Wace* (b), where it was held that a party who had obtained his discharge from a debt, on the ground that it had been proved under a valid commission of bankruptcy against him, could not in an action against the assignees dispute the validity of the commission.

*Bramwell* contra was not heard.

LORD DENMAN C. J.—If *Beynon v. Garrat* (a) is correctly reported, the authority cannot be sustained: a man owes me 20*l.*, and I take 10*l.*, how can it be said that I waive the rest?

PATTESON and WILLIAMS Js. concurred.

Judgment for the plaintiff.

(a) 1 C. & P. 154.

(b) 5 B. & C. 153; S. C. 7 D. & R. 633.



1840.

Friday,  
June 12th.


FRANCIS DAYRELL v. HOARE and others.

1. A power to demise lands, or any part of them, is not well executed by a devise of part, with liberty of shooting over the whole.

2. Where it is necessary to a plea of justification, under a lease from tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer.

**TRESPASS** for breaking and entering the plaintiff's close. Plea: that before the said times when &c., to wit, on the 6th of January, 1794, one *Richard Dayrell* was seised in fee (amongst and together with certain other hereditaments) of the close in which &c., and of the messuages &c. hereinafter mentioned to have been demised to the defendant *Hoare*, with the appurtenances respectively, and being so thereof seised, the said *R. Dayrell* duly made and published his last will &c., and devised, amongst other messuages, lands, &c. the close in which &c., and also the said messuages &c. mentioned to have been demised to the defendant *Hoare*, with the appurtenances respectively (after the termination of estates previously limited), to his nephew *R. Dayrell*, without impeachment of waste, with remainders over &c. And the devisor did also by his will declare that it should be lawful for every person and persons, to whom any estate for life was thereby given, when he and they should be in the actual possession, from time to time and at all times during their respective natural lives, when and so often as he or they should think fit, by any deed &c., to make any lease in present possession, but not in reversion, of the said several estates, hereditaments and premises, so given to them for their respective lives, or any part or parts thereof, for any term not exceeding twenty-one years, to take effect in possession and not in reversion, so as upon every such lease there should be reserved, during the continuance thereof, the best and most improved yearly rent, and without any fine, premium or foregift &c. and so as in every such lease there should be contained a clause of re-entry for non-payment of the rent &c. That after the death of the devisor &c., and the termination of the prior estates limited by the will, his nephew *R. Dayrell* became seised for life, and in the actual possession &c., and before the time when &c., to wit, on the 28th day of November, 1835,

by a certain indenture then made between the same *R. Dayrell* of the one part, and the defendant *Hoare* of the other part (profert), *R. Dayrell*, for the considerations therein mentioned, and in execution of the power aforesaid, demised unto the defendant *Hoare* a certain messuage &c., *being parcel of the estates and hereditaments so devised as aforesaid, together with full liberty* to the defendant *Hoare*, his executors and administrators, and his and their friends in his or their company, or with his or their permission, and to and for his or their gamekeeper, or servant employed in that or the like capacity, at all seasonable times of the year, to hunt, course, shoot and fish over the demised premises, and also over any other of the lands whatsoever, for fourteen years, yielding and paying therefore &c., unto the said *R. Dayrell*, or other the person or persons for the time being entitled to the immediate reversion of the demised premises, expectant upon the determination of the said lease, a rent of 200*l.* being the best and most improved rent &c.

1840.  
  
 DAYRELL  
 v.  
 HOARE.

The plea then proceeded, after averring the compliance of the lease with conditions of the power seriatim, to state the entry of the defendant under the lease, and to justify the trespass on behalf of himself, and of the other defendants, as his servants, in exercise of the liberty of sporting, granted by the lease. Verification.

Special demurrer, on the grounds, among others, that *R. Dayrell* had no power to demise the liberty of sporting, except over the premises demised; that the liberty of sporting lay in grant, and could not pass by the words "demise and lease;" that no rent was reserved for the liberty of sporting; that the rent was not incident to the reversion.

Sir *F. Pollock*, in support of the demurrer. The power to demise the whole or part of the premises in question has not been well executed by a demise of part of them, with permission to sport over the whole. The permission to sport is not a franchise or an easement or an appurte-

1840.  
  
 DAYRELL  
 v.  
 HOARE.

nance, it is merely a personal license: *Doe d. Douglas v. Lock* (a), which was recognised lately in *Wickham v. Hawker* (b), in the Exchequer; and "incidents of a novel kind cannot be attached to property at the fancy or caprice of any owner," per Lord Brougham C., *Keppell v. Bailey* (c). The power applies to the "estates, hereditaments and premises" given by the will, and cannot apply to the right of sporting, if such a grant could be made of such a right. Nor can such a right pass as appurtenant to anything within this power; see *Co. Lit.* 121 b, *Com. Dig. Appendant &c.* (C), *Morris v. Dimes* (d). The things demisable within the power are to be ascertained by reference to the conditions annexed by it to the execution of the power, which must be strictly pursued with reference to the intention of its donor: *Pomery v. Partington* (e), *Campbell v. Leach* (f), *Foot v. Marriott* (g). The power requires the best rent to be reserved, but rent cannot issue out of a right of sporting, nor, were it otherwise, would this rent, as required by the power, "be incident to and go along with the remainder:" *Jewel's case* (h), Lord Mountjoy's case (i). [*Littledale J.* It does not appear that the lessor is dead; might he not, during his life, give the right of sporting to any one, without reference to the power?] The death of the lessor, the tenant for life, is not excluded by the plea, and must be taken to be admitted; it was for the defendant to aver the continuance of the lessor's life, if he relied on it as his justification; a replication alleging the death would have led to an immaterial issue, as the defendant relies upon the power having been well executed.

Sir W. W. Follett contra. The very question now under discussion would have been disposed of by such a replica-

(a) 2 A. & E. 743; S. C. 4 N. & M. 824.  
 (b) 7 M. & W. 63.  
 (c) 2 Mylne & K. 535.  
 (d) 1 A. & E. 654; S. C. 3 N. & M. 671.

(e) 3 T. R. 665.  
 (f) Ambler, 748.  
 (g) 3 Vin. Abr. 429, pl. 9.  
 (h) 5 Rep. 3 a.  
 (i) 5 Rep. 3 b.

tion, so that the issue would have been material. [*Little-  
dale J. Ingram v. Tothill*(a) is an authority that the de-  
fendants should have averred that the tenant for life was  
living at the time of the trespass. *Patteson J.* referred to  
*Fryer v. Coombs*(b).] The plaintiff should have demurred  
on that ground, if it is tenable, but it is submitted that the  
ordinary presumption in favor of the continuance of life  
must prevail. This action cannot be supported, unless on  
the ground that the lease is void altogether; it does not  
appear that the plaintiff has any interest in the premises;  
he may be a mere stranger, and, if he is so, cannot set up  
that the execution of the power is defective. *Davies's*  
case(c) shews that the right of sporting may be prescribed  
for in a que estate. *Moore v. Lord Plymouth*(d) also shews  
that such a right is not a mere personal privilege, and  
*Duke of Somerset v. Fogwell*(e), and *Bird v. Higginson*(f),  
which turned on the very point, that it was an incorporeal  
hereditament, and could not pass without a deed. The  
power does not require the tenements to be let entire, and  
there can be no objection to letting part of the land,  
with the right of sporting over the whole, which was the  
very case in *Tomlinson v. Day*(g), or to letting one farm  
with the tithes or pasturage of another, or a right of way  
over it. If the land itself might have been parted with, to  
the prejudice of the remainder man, why not the right of  
sporting over it only? In *The Dean and Chapter of Windsor*  
*v. Gover*(h), the Court was inclined to think that a rent  
might be reserved out of an incorporeal thing, so as to go  
with the reversion. Lord *Mountjoy's* case(i) was referred  
to in *Doe d. Earl of Shrewsbury v. Wilson*, and some doubt

1840.

DAYRELL  
v.  
HOARE.

(a) 1 Mod. 216; S. C. 2 Mod.  
93.

(b) See note (a) at the end of  
this case.

(c) 3 Mod. 246.

(d) 7 Taunt. 614; S.C. in error,  
3 B. & Ald. 66.

(e) 5 B. & C. 875; S. C. 6 D.  
& R. 747.

(f) 2 A. & E. 696; S. C. 8 N.  
& M. 505; in error, 6 A. & E.  
824; S. C. 6 N. & M. 791.

(g) 5 B. Moore, 558.

(h) 2 Saund. 302.

(i) 5 Rep. 3 b.



1840.

DAYRELL  
v.  
HOARE.

cast upon its authority. The power has been well executed, and the lease is to be taken as good, upon these pleadings, independently of the power.


Sir *F. Pollock* in reply. An estate cannot be carved out in a manner unknown to the law, as to males and females in tail alternately. A right of sporting may be given, as in *Tomlinson v. Day*, but only by way of contract between parties. This power therefore is ill executed, and the continuance of the lessor's life cannot be relied upon; it is a matter within the cognizance of the defendants, and has not been averred. The continuance of the life was essential to the defendant's title, which is defective altogether, and not merely defectively stated, and the plea is bad on general demurrer.

LITTLEDALE J. (*a*).—The plaintiff is entitled to judgment. There are two points to be considered: first, whether it is to be taken upon these pleadings that *R. Dayrell* is still living; for different considerations arise according to the answer which that question is to receive. It is not averred on the one hand that he is dead, or on the other that he is still living. I think the plea should have averred that he is still living, though at first I had a different impression, which *Ingram v. Tothill* (*b*) shews to be erroneous. The plea is bad on general demurrer for this reason.

Can the plea then be supported, as shewing that the lease was a good execution of the power? The power allows the whole "or any part or parts" of the property to be let. But this must mean parts of some entire thing, as, if the premises consisted of a house and 1000 acres of land, it would be a good execution of the power to let the house and 100 acres only; but the whole of what covers the land demised must be demised with the land. Here the land is demised subject to a servitude of the right of shooting over it. On this ground I think the lease cannot

(*a*) Lord *Denman* C.J. was absent.      (*b*) 1 Mod. 216; S. C. 2 Mod. 93.

be supported as a valid execution of the power. I decide on the ground that neither is the general entirety demised, nor is any entire part. I do not think it necessary to express any opinion upon the legal nature of this right of shooting.

1840.  
  
 DAYRELL  
 v.  
 HOARE.

PATTESON J.—The plea ought to have averred that the tenant for life, whose lease is relied upon, was still living. In 1 *Wms. Saund.* 235, n. (8) to *Thursby v. Plant* it is said, “there is a difference between an estate of inheritance in fee simple, and a particular estate for life; for where an estate is derived from tenant in fee simple, whether absolute or qualified, as bishop, dean, or the like, the law intends a continuance of the estate, if the contrary does not appear, and therefore it needs not be averred: but where the estate is derived from one who has only a particular estate, as for life, the continuance of such estate must be averred, for the law does not intend the continuance of the life without an averment.” The point was raised in the late case of *Fryer v. Coombs* (a), where it was said that the continuance of the life appeared by implication, which according to the same note in *Wms. Saund.* is sufficient after verdict at all events, or on general demurrer.

But it is evident that the plea did not mean to rely on the continuance of the lessor’s life, but upon the lease being a good execution of the power. I am clearly of opinion that the lease is not a good execution of the power. The lease is of part of the premises, with a right of shooting over the whole. This right of shooting was certainly not free warren, or any thing that would pass separately from the land itself. It is the land itself that gives the right of shooting, and the lessor had no power to separate the land from one of its incidents.

WILLIAMS J. concurred.

Judgment for the plaintiff.

(a) The following is the judgment given in the case referred to by *Patteson J.* in Hilary term last:—

1840.

FRYER  
v.  
COOMBS.

A declaration for rent, by assignee of a reversion for the life of a third person against assignee of the term, omitted to aver that cestui que vie was living when the rent accrued due:—Held, that the continuance of the life was not to be implied from the mere deduction of title, and an averment in the breach that “after plaintiff became so seised the rent became due and still is in arrear to the plaintiff;” and that the declaration was bad on general demurrer.

This was an action of debt for rent by the assignee of the reversion against the assignee of the term. The lease was granted under a power contained in the will of one *Jeremiah Cray*. Upon demurrer to the declaration, the case was argued at the sittings after last Trinity term and several objections were taken by the defendant, which were overruled by the Court, and judgment was given for the plaintiff.

In Michaelmas term the counsel on both sides agreed that another point had not been argued, owing to a mistake into which they had both been led as to the very words of the declaration, and proposed that the case should be reheard for the purpose of discussing that point. It was accordingly directed and agreed that the case should be heard before a single judge at chambers as to that point. Upon the hearing, before me, the point appeared to be this. The declaration states that *Jeremiah Cray*, being seised in fee, by his will devised to his wife for life, remainder “to Sir Thomas Broughton and Christopher Taylor upon the trusts therein mentioned.” It then sets out a power for the wife during her life, and “after her decease to and for the said Sir Thomas Broughton and Christopher Taylor, and the survivor of them, his heirs, executors or administrators,” to demise. It then states a demise by the wife (which the Court have already held to be good), the death of the wife, and a conveyance of the reversion by lease and release by Sir T. Broughton and C. Taylor, and by A. C. Grant, Lewis James Grant, and Henrietta M. Grant, to W. Fryer, his heirs and assigns, whereby W. Fryer became seised in his demesne as of fee. It then states the will of W. Fryer, whereby he devised to the plaintiff for life, and that W. Fryer died seised, whereby the plaintiff became seised of the reversion for life; then that the defendant became assignee of the lease; and then follow these words;—“that after making of the said indenture, and during the said term thereby granted, and after the plaintiff became so seised and interested of the said reversion of and in the said demised premises, with the appurtenances, from 25th March, A.D. 1838, a large sum of money, to wit, the sum of 27*l.* of the rent aforesaid for four years and a half of the said term, ending on the day and year last aforesaid, and then last elapsed, and all of which accrued due after the plaintiff became so seised as aforesaid, became and was due and still is in arrear and unpaid to the said plaintiff; contrary, &c.

The objection to this declaration is, that there is no averment that either Sir T. Broughton or C. Taylor was living when the rent accrued due. The objection arises on general demurrer; for, though special causes of demurrer are assigned, I am clearly of opinion that they do not point to this objection. No doubt such an averment is necessary; for by the will, as stated in the declaration, Sir T. Broughton and C. Taylor took an estate for life only, for want of words of inheritance (which estate was not enlarged by the subsequent words used in creating the power), and they conveyed nothing more to W. Fryer than an estate for their lives, and the plaintiff could take nothing more by

*W. Fryer's* will. The declaration does not set out the trusts of *Jeremiah Cray's* will, nor any devise subsequent to that to Sir *T. Broughton* and *C. Taylor*. The Court therefore cannot tell why the *Grants* joined in the conveyance to *W. Fryer*; nor whether their so joining had any, and, if any, what effect. The averment that *W. Fryer* was seised in fee is contradictory to the facts and documents stated; and it is plain that the plaintiff was seised of the reversion for his own life, if Sir *T. Broughton* and *C. Taylor* should so long live, and no longer. The case of *Thursby v. Plant* (a), and the cases cited in the note there, shew, beyond a doubt, that the continuance of the lives of cestuis que vie ought in such a case to be averred. But it is argued that such continuance is impliedly averred by the words of the breach, viz. that the rent, "all of which accrued due after the plaintiff became so seised as aforesaid, became and *was due and still is in arrear to the said plaintiff*," because unless the lives continued, it could not be due to the plaintiff. If this argument be good, *all* statements of the mode by which the reversion passed to the plaintiff might equally be omitted, whereas it has long been established beyond dispute that the derivative title of the plaintiff must be traced. The only colour for this argument arises from three cases cited in the note to *Thursby v. Plant* above referred to, but on examination they do not sustain it.

The first case is *Scamler v. Johnson* (b). There the plaintiff, who claimed under a rector, averred that the rector was and *still* is seised: doubtless that averment implied that the rector was living at the time of the declaration. The second case is *Anon.* (c) and *Tompson v. Withers* (d), evidently the same case on error. It was an action on the case for a nuisance, in building too near the plaintiff's house: the declaration stated a demise to plaintiff for years, if the lessor should so long live, by virtue of which the plaintiff hath been and *still is possessed*, without averring the life of the lessor. The Court held that there was a sufficient averment by implication of the life of the lessor, who must of necessity be living, otherwise *the plaintiff could not be possessed*. The declaration is not given at length in either of the reports, which are very short; nor does it appear to have been discussed whether possession alone was not enough to sustain the action, without shewing title, as doubtless would be now held. Probably the averment was taken strictly, as meaning that the plaintiff still was possessed *by virtue of the lease*; and, if so, it necessarily implied the continuance of the lease, i.e. the life of the lessor; and, if the present declaration had not only averred that the plaintiff became seised of the reversion for life, but had added, "and still is," it would have been difficult to distinguish the cases; but those words are wanting in the present case. The third case is *Harlow v. Bradnor* (e), in which defendant made cognizance for

1840.

FRYER  
v.  
COOMBS.

(a) 1 Saund. 235.

(c) 1 Brownlow &amp; G. Part i. p. 4.

(b) Dyer, 304 a; S.C. Sir T. Jones, 977.

(d) 2 Bulstr. 263.

(e) 2 Lev. 88.

1840.

FRYER  
v.  
COOMBS.

rent as bailiff of husband and wife. At that time it was necessary to set out the title of the landlord, and of course it appeared by the record that the wife was entitled to the rent for life; it must then have averred that the rent was due and in arrear to her, or to her husband in her right, and that the defendant, as bailiff to the husband and wife, distrained. On special demurrer, alleging for cause that the wife was not averred to be living, the Court held that the words "being in arrear" were quasi an averment of the wife's life, and good enough. Perhaps it may be doubted whether the report accurately shows the ground of the decision; but it is obvious that, as a person cannot be bailiff to one who is dead, the making cognizance as bailiff to *A.* necessarily implies that *A.* was alive when the distress was made; it is as much implied as the life of a party to the record, which is never averred. But the present case regards the life of a third person not party to the record, nor averred to have authorised the act done by the party pleading.

I am therefore of opinion that the cases cited do not govern the present; that the continuance of the life of *Sir T. Broughton* or *C. Taylor* is not necessarily to be implied; and that the judgment must be for the defendant.

Judgment for the defendant.

### The QUEEN v. STERRY and another.

The Society of Friends conveyed certain premises to trustees, as a school for the education of poor children. A committee met at the school once a quarter for the management of its affairs, and appointed

ON appeal against a rate for relief of the poor of Croydon, in Surrey, in respect of a house, garden and premises called the Friends' School, not including the two wings of the house occupied by the scholars, the sessions confirmed the rate, subject to the following case:

The Friends' school was instituted in 1702, by voluntary subscriptions amongst the members of the Society of Friends in London, for the purpose of maintaining, educating and employing the children of the poor of that society, and of other a sub-committee, who met there once a month, and in the intervals the management was confided to a superintendent, who resided on the premises and received a salary. No child was eligible whose parents could defray the charge of its education elsewhere. The average expense of maintaining and educating each child was 20*l.* a year, towards which the child's friends, if able, were required to pay 12*l.* a year. The children, servants, matron and superintendent, were the only persons who resided on the premises.

Held, that the trustees were occupiers, and that the payment of 12*l.*, although it produced no gain on the balance, was a profit, which made them beneficial occupiers, and, therefore, chargeable to the poor rate in respect of the premises.

persons not in membership. A considerable fund was raised at the time when the establishment was first instituted, which has since from time to time been increased by bequests, donations and voluntary subscriptions, to the amount of 30,000*l.* and upwards; and this fund has been invested in the purchase of stock and landed property in the names of trustees, in trust for the purposes of the institution. The establishment is under the direction of the committee of management of the quarterly meeting of the Society of Friends in London and Middlesex. In the year 1823, a house and premises in the parish of Croydon were purchased by and conveyed to the trustees, and such additional buildings were erected thereon as to adapt the premises to the accommodation of 150 children, and, to defray the expenditure thus incurred, a considerable sum was raised by voluntary contributions from members of the Society of Friends in various parts of the country, and from other persons not members of the society. In 1825, the establishment was removed from Islington to the said house and premises, where it has since been carried on. At the time of such purchase, in the year 1823, the said house and premises were assessed to the poor rate at a rental of 60*l.* per annum, and the society were, after they took possession, assessed to the same amount and paid the rate thereon for some time, and afterwards on a rental of 100*l.* per annum, down to 1835, when the said assessment was raised to 140*l.* per annum.

The general management of the establishment is entrusted to a committee of twenty-four men and twelve women Friends, who are appointed by the quarterly and monthly meetings of Friends in London and Middlesex. A certain number of the committee go out of office every other year by rotation, and such members as cease to belong to the meeting by which they were appointed, or do not attend the committee for the space of one year, are disqualified, and the vacancies so occasioned are filled up by new appointments. The committee meet at the school once in

1840.

The QUEEN  
v.  
STERRY.

1840  
 The QUEEN  
 v.  
 STERRY.

every quarter of a year, but they appoint a sub-committee, who meet there once a month, and in the interval the management of the establishment is placed under the care of the superintendent and mistress of the family, who reside upon the premises. None of the committee or sub-committee receive any emolument or salary, but the superintendent and mistress of the family, who are appointed by the committee, and are liable to be discharged by them at a summary notice, are paid an annual salary. The cash of the institution is kept at a banking-house, approved of by the committee, in the name of the treasurer, who is nominated by the committee, and, if approved of, appointed by the quarterly meeting of London and Middlesex, and he becomes a member of the committee by virtue of his office, but the treasurer does not reside upon the premises, nor does he receive any remuneration whatever.

The children received into the establishment are nominated by agents appointed by the quarterly and monthly meetings before mentioned, and are admitted if approved of by the committee. No child is eligible if its parents are able to defray the expenses of its education elsewhere. The number of children maintained and educated since the removal of the school to Croydon, has varied from 130 to 150, and at the time of the assessment there were eighty boys and seventy girls, of whom nearly thirty were the children of persons not members of the Society of Friends. The average expense of maintaining and educating each child is upwards of 12*l.* per annum, but, in a great number of cases, in consequence of their inability to raise this amount, it is collected from friends, or by contributions from the meetings where they reside, and no child is admitted into the establishment without the annual contribution of 12*l.* The difference between the actual expenditure in respect of the education and maintenance of the children and the sum thus paid by the parents or friends, is made up from the annual income derived from the interest of the stock, the rents of the landed property before mentioned,

and constant annual contributions; and, if these are insufficient, by extra collections from members of the society and other persons. Any surplus, remaining after payment of the expenses, is treated as part of the fund for the support of the institution, and is appropriated solely to that object.

The house which is rated contains an apartment for the superintendent, another for the matron, a kitchen for the use of the establishment, a room in which the committee and sub-committee hold their meetings, and rooms for domestic servants; but the matron, superintendent, servants and committee, have no other accommodation than is essentially requisite for the discharge of their duties connected with the school. The garden and other premises are cultivated and used only for the children, viz. for the growth of vegetables and fruit consumed in the household, no private advantage being derived therefrom by any officer or servant of the establishment. No other person than the children, the servants, matron and superintendent, reside upon the premises.

The question for the opinion of the Court was, whether the premises, not including the two wings, were under the circumstances above stated rateable to the relief of the poor (a).

*Petersdorff*, in support of the order of sessions (b). There is no difficulty in the present case in ascertaining the party on whom the rate is to be made, or in holding that he is liable to the rate in respect of the particular property. The trustees are virtually the occupiers, and they are beneficial occupiers, because a money payment is made by the children, and it is immaterial that the trustees derive no personal benefit from such payment, and that it does not, on a balance of profit and loss, cover the society's expendi-

(a) It was agreed that the question should be thus stated, and that, if any rate were payable, the trustees should be the persons rated.

(b) The case was argued in Easter term last (April 29), before Lord Denman C. J., Littledale, Patteson and Coleridge Js.



1840.  
 ~ ~  
 The QUEEN  
 v.  
 STERRY.

ture upon the children: *Rex v. St. Giles's, York* (a), and *Rex v. Agar* (b), which was considered by Lord Tenterden C. J. as not distinguishable from the former case. The payment of the 12*l.* for each child distinguishes the present case from *Rex v. Waldo* (c), *Rex v. St. Bartholomew's the Less* (d), and *Rex v. St. Luke's Hospital* (e), and other cases collected in *The Governor of the Bristol Poor v. Wait* (f), (in which even a workhouse that was situate out of its own parish was held rateable,) for in those cases no return was had from the persons benefited by the respective charities. Even the very persons who have occupied as objects of a charitable foundation have been held rateable: *Rex v. Munday* (g).

Sir J. Campbell A. G. and M. Chambers contra. It seems to be admitted that the appellant would not be rateable if it were not for the payment of 12*l.* for each child. Notwithstanding this payment the institution is purely a charitable institution, charitable perhaps to a limited class, viz. to the class of persons who can afford to pay 12*l.* a year, but still a charitable institution, for no profit arises in respect of which any one can be called beneficial occupier of the premises rated. In *Rex v. St. Giles's, York* (a), the institution, which was a lunatic asylum, was not purely charitable, for the affluent were admitted as patients, some of them on payment of 100*l.* a year, and a profit was realised, so that in five years about 2000*l.* had been accumulated. The trustees there were held rateable on the ground that profit was made by the asylum over and above the expenditure. Even the parish paupers, who were inmates of that asylum, made weekly payments of 6*s.* That case therefore might have been distinguished from *Rex v. Agar* (b), which was the case of a Methodist chapel, and not a charitable insti-

(a) 3 B. & Ad. 573.

(b) 14 East, 256.

(c) Cald. 358.

(d) 4 Burr. 2435.

(e) 2 Burr. 1053.

(f) 5 A. & E. 1; S. C. 6 N. & M. 383.

(g) 1 East, 584.

tution, and in which the money received by the trustees of the chapel did not cover the disbursements. In *The Governor of the Bristol Poor v. Wait* (a), and *Reg. v. Wallingford Union* (b), the workhouses, which were rated, were hired for the especial advantage of the occupiers, for they thereby advanced, not any public or charitable purpose, but the discharge of their own peculiar duty to provide for the poor of their district.

1840.  
  
 The QUEEN  
 v.  
 STERRY.

If the test suggested by Lord Mansfield C. J. in *Rex v. St. Luke's Hospital* (c), be applied to this case, viz. that nominal trustees cannot be rated, nor servants, nor the objects of the charity, it will appear that the rate must be bad, as there is no party upon whom it can properly be laid.

*Cur. adv. vult.*

Lord DENMAN C. J. during the sittings after this term, (June 18) delivered the judgment of the Court as follows:—

This was a rate made upon the appellants in respect of a house, garden, and premises in the parish of Croydon, exclusive of two wings of the house actually occupied by the scholars of the institution, which is there carried on, and two questions are made, whether there is any such beneficial occupation of the premises as will make the occupier rateable in respect thereof, and also who, if any, is such rateable occupier.

The institution is in the main charitable; first taking its origin, and since for the most part maintained, by donations and subscriptions; it is devoted to the maintenance and education of children, afforded to them in a great proportion gratuitously; the trustees, managing committee and subscribers, receive no pecuniary benefit, and the servants of the institution no more than may be considered as mere wages for their services, and so far as regards the premises in question, they are found to have no other accommoda-

(a) 5 A. & E. 1; S. C. 6 N. & M. 383.

(b) 2 P. & D. 226.

(c) 2 Burr. 1053.

1840.

The QUEEN  
v.  
STERRY.

tion from them "than is essentially requisite for the discharge of their duties connected with the school."

The premises were purchased by the society and conveyed to their trustees in 1823; at that time the occupiers were assessed to the poor rate, and the society has continued to be so down to the present time. They have added to the buildings from the charitable funds before alluded to, and they cultivate the garden, and whatever is not built upon, devoting the produce to the use of the scholars and the household.

These children are admitted on the following terms—the average expense of maintaining and educating each is estimated at 20*l.* per annum; no child is admitted whose parents are considered able to defray the expenses of its education elsewhere; nor any, whose parents or friends will not contribute annually 12*l.* of the 20*l.*, which is expected to be the cost of maintaining and educating the child.

Upon these facts we are to determine the questions before stated; and no one can review the numerous decisions which cases somewhat like the present have occasioned, without regretting that the Court was ever induced to depart from the simple test, which the subject matter of occupation would in every case have afforded. Whether the occupation was in respect of private, or public, or charitable purposes, it would have been, we think, wiser to have disregarded; and, wherever the subject matter was found productive to any one, to have rated the actual occupant in respect of that produce. The Court, however, would be bound by the authorities, for nothing is so important in this branch of the law as uniformity and certainty; but it will not be necessary to overrule any decision in order to support the rate in this case. There is clearly a rateable subject matter, that is, a subject, the occupation of which, under ordinary circumstances, would make the occupier rateable. If these premises were to be let by the society, and every shilling of the rent devoted to the same purposes, as at present, carried out in some other place,

tenant would be rateable on the amount of the rent paid as the clear annual value of the occupation. But, when in the hands of the society, there is a circumstance connected with the occupation which brings it within the ordinary rule, and distinguishes it from those cases of occupation for charitable purposes, which have been considered not rateable as not beneficial. This circumstance is payment of the 12*l.* per annum by or on behalf of each scholar; this sum, it is true, is not adequate to the expense, and in a popular sense does not make the occupation of the premises beneficial, i. e. gainful, but still it is a revenue which the building produces, and actual gain on a balance of profit and loss is not needful; it is enough if a revenue be produced.

With regard to the occupier, there is no difficulty in determining that the trustees must be considered as such, they are the owners of real property which is not demised to any one; the committee from time to time use certain lands, the matron and servants of the establishment at all times, but in all these cases the occupation is by the permission of the trustees, and in point of law must be considered as theirs. In this respect the case resembles that of the Lunatic Asylum at York (*a*), and that of *The King's Mayors of York* (*b*), to which case the present in all respects bears a very near resemblance, so strong indeed as to be substantially distinguishable from it.

Upon the whole, we are of opinion that the sessions are right, and that their judgment must be affirmed.

#### Order of Sessions confirmed

(*a*) 3 B. & Ad. 573.

(*b*) 6 A. & E. 419; S. C. 1 N. & P. 539.

1840.

The QUEEN  
v.  
STERRY.

1840.

Thursday,  
June 18th.

The QUEEN v. WILSON.

Same v. Same.

1. The Treasurer of the London Missionary Society was rated to the relief of the poor, in respect of a house taken by the society, under a lease, for religious and charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, and neither did he nor any other person connected with the society derive any profit from the occupation of the premises:—Held, that he was not rateable to the relief of the poor.

2. But held, that he was properly assessed to a church rate, under an act extinguishing tithes in the parish, and authorising a yearly church rate to be made, in order to raise money for the payment of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because beneficial occupation was not material in the latter case.

ON appeal to the London sessions against a rate, whereby the appellant was assessed to the relief of the poor of St. Botolph without Bishopsgate, in respect of the premises hereafter mentioned, the sessions confirmed the rate, subject to the following case:—

The poor rate in question was made under the authority of an act, 35 Geo. 3, c. 61, which was passed for the more effectually assessing and collecting the poor-rates of St. Botolph, Bishopsgate. By the 16th section of that act, it is amongst other things enacted, that the rector, churchwardens, overseers of the poor, and inhabitants of the said parish, shall from time to time make such rate or rates, assessment or assessments, for and towards the relief of the poor of the said parish, upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, coachhouse, stable, cellar, vault, or any other building, tenement or hereditaments within the said parish, and on every other person and persons who by law is, are or shall be chargeable or liable to be assessed for or towards the relief of the poor of the said parish, as they the said rector, churchwardens, overseers of the poor, and inhabitants of the said parish, shall think necessary and proper to be rated and assessed.

The appellant, at the time when he was assessed to the said poor rate, was and still is the honorary treasurer of the London Missionary Society, which was founded entirely for religious and charitable purposes, and is wholly supported by voluntary and charitable contributions.

The premises, in respect of which the society are assessed, are situate in the parish of St. Botolph, Bishops-

gate, and authorising a yearly church rate to be made, in order to raise money for the payment of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because beneficial occupation was not material in the latter case.

1840.


  
The QUEEN  
v.  
WILSON.

gate, and consist of a building erected at the expense of the society, and by them occupied merely for conducting the affairs of the institution, under an agreement for a building lease from the corporation of London. The building comprises various apartments, namely, a board-room, in which the board of management and subscribers to the society are accustomed to assemble, a secretary's room, a museum, several clerks' offices, and several store-rooms, in which various articles intended for exportation in furtherance of the society's objects are deposited. No person has ever slept upon any part of the premises. The clerks and officers of the establishment all attend during a portion of the day only, and leave the premises in the evening, locking them up and taking the keys away with them. The appellant attends on the premises about one day in a week, for a few hours only, in his capacity of treasurer, and for the purpose of superintending the society's affairs, which are there carried on by the society's clerks. He receives no remuneration from the society, but on the contrary contributes largely to their funds, nor does he or any other person connected with the society derive any pecuniary profits or personal emolument in any way from their occupation of the premises; the clerks, who receive salaries, being mere servants of the society, who are paid as such for their daily services performed on the premises.

Neither the appellant nor any other person connected with the society, and occupying their premises as above described, was at the time the said poor rate was made, or now is, resident within the parish of St. Botolph, Bishopsgate, or possessed of or in any manner interested in any property situate within that parish, except as above mentioned.

The question for the opinion of the Court was, whether the society under these circumstances was by law liable to be assessed to the poor rates made in that parish. If the Court should decide this question in the affirmative, the

1840.

  
 The QUEEN  
 v.  
 WILSON.

order of sessions, disallowing the appeal, was to be confirmed, and the rate to stand unaltered: if otherwise, the order of sessions was to be quashed, and the rate to be amended by erasing the name of the appellant from it.

Poor rate.

*Perry*, in support of the order of sessions (*a*). *Primâ facie* all real property is rateable to the relief of the poor; and the present case does not come within any of the three classes of exemption; the first of which is where there is no beneficial occupier, as in *Rex v. Waldo* (*b*) and *Rex v. St. Luke's Hospital* (*c*); the second, where the occupiers are mere trustees and no profits derived, as in *Rex v. Woodward* (*d*); the third, where the occupiers make profits, but are bound to devote it to public purposes, as in *Rex v. Liverpool* (*e*), *Rex v. Salter's Loud Sluice* (*f*), and *Reg. v. Mayor of Liverpool* (*g*).

It is found that the establishment is devoted to religious and charitable purposes, but it does not appear what sort of religious and charitable purposes; and, if property was generally exempt by its application to such purposes, the 3 & 4 *Will.* 4, c. 30, which expressly exempts chapels and other places of worship, would have been unnecessary; and the law of this country will scarcely hold that a charitable institution, which has for its object the benefit of strangers abroad, to the prejudice of the poor at home.

The premises here are under lease; so that the occupation must be beneficial to the owner.

*Ryland* contra. *Rex v. Waldo* (*b*) governs the present case; and the circumstance of the premises being under

(*a*) The case was argued on a former day in this term (June 3), before Lord *Denman* C.J., *Little-dale*, *Patteson* and *Williams* Js.

(*b*) *Cald.* 358.

(*c*) 2 *Burr.* 1053.

(*d*) 5 *T. R.* 79.

(*e*) 7 *B. & C.* 61; *S. C.* 9 *D. & R.* 780.

(*f*) 4 *T. R.* 730.

(*g*) 1 *P. & D.* 334.

lease (a) existed in *Rex v. St. Luke's Hospital* (b), but has never been supposed to distinguish it from *Rex v. St. Bartholomew the Less* (c), and other cases. The non-residence of the appellant upon the premises distinguishes this case from *Rex v. Green* (d), where poor persons occupying an alms-house were held rateable.

1840.  
  
 The QUEEN  
 v.  
 WILSON.

*Cur. adv. vult.*

The same defendant was also the appellant against a church rate, to which he was assessed in the same parish, and which rate also was confirmed by the London Sessions, subject to the following case:—

Church rate.

The church rate in question was made under the authority of 6 Geo. 4, c. lxxvi. s. 14 (local and personal), and is intituled, “An Act for Extinguishing Tithes and customary Payments in lieu of Tithes within the Parish of St. Botolph-without-Bishopgate, in the Liberties of the City of London, and for making Compensation to the Rector for the time being in lieu thereof.” It recites that it will be beneficial to the inhabitants of the parish that a certain annual stipend should from thenceforth be paid to the rector of the parish for the time being, in lieu and in full satisfaction of all tithes or payments within the parish, in manner and under the regulations thereafter mentioned, and enacts, that the churchwardens of the parish for the time being shall from time to time, for ever thereafter, pay or cause to be paid to the rector for the time being of the parish one annual sum of 2500*l.*, in lieu, satisfaction and discharge of all tithes, or payments in lieu of tithes, to which such rector was entitled, or might by law claim as such rector within the parish. It further enacts, that from and immediately after the 24th of June, 1825, all tithes, and payments in lieu of tithes, which the rector for the time

(a) The case does not state that any *rent* was paid by the society, so as to shew a profit to the owner which could be rated in the hands of the occupier.

(b) 2 Burr. 1053.

(c) 4 Burr. 2435.

(d) 9 B. & C. 203; S. C. 4 M. & R. 164.



1840.


 The QUEEN  
v.

WILSON.


Church rate.

being might otherwise have had by law, or to which the rector for the time being was entitled or might claim within the parish, should cease and be for ever extinguished. And for raising and paying the said annual sum of 2500*l.*, and also for the purpose of repairing the parish church and otherwise carrying the objects of the said act into effect, it enacts that, at a vestry meeting to be convened once every year, or oftener if required, the churchwardens and inhabitants, or any ten of the inhabitants, shall proceed to make and sign a sufficient assessment, to be called the church rate, "upon all persons inhabitants and occupiers of land, tenements, hereditaments, and premises within the said parish, except the said rector for the time being." And it then provides, that all person and persons who shall become resident within the said parish, and liable to be rated to the said "church rate," after the making of any such rate and during the period for which the same rate was made, shall, in the church rate made next after he, she, or they shall become resident, be rated and assessed from the day of his, her, or their becoming so resident.

Previously and down to the time of the passing of the above recited act, the parish of St. Botolph, like other parishes within the city and liberties of the same not included in the act for maintenance of clergy after the fire, was subject to the operation of 37 *Hen.* 8, c. 12, and the decree made thereon, which decree, in a case some years back taken to the House of Lords by appeal from a Court of Equity, was adjudged to have been enrolled, though no record of such enrolment could be found.

The case then set out clauses of the decree regulating the scale on which the citizens of London were to pay tithes according to the rents of their houses, shops, warehouses, cellars and stables: and concluded by stating the non-residence of the appellant on the premises and within the parish, and the circumstances connected with the occupation of the premises belonging to the London Missionary Society, as in the former special case.

The question for the Court was, whether the society, under the above circumstances, were by law liable to be assessed to the church rate made in that parish under the statute above recited. If the Court should decide the question in the affirmative, the order of sessions disallowing the appeal was to be confirmed, and the rate to stand unaltered; if otherwise, the order of sessions to be quashed and the rate to be amended by erasing the name of the defendant from it.

1840.  
  
 The QUEEN  
 v.  
 WILSON.  
 Church rate.

*Perry* in support of the order of sessions. The cases of exemption from poor rate do not apply to the question of liability to this church rate, for beneficial occupation is not necessary to render a person liable under this act, which includes "all persons inhabitants and occupiers." Nor is residence necessary to constitute the appellant an inhabitant, for there is a distinct proviso as to residents, who are therefore for this purpose a distinct class from inhabitants. The appellant therefore, who attends the office and represents the society, is liable to the church rate, whether as occupier or inhabitant; *Jeffrey's case* (a), *Paget v. Crumpton* (b), and per *Abbott C. J.* in *Rex v. Adlard* (c). He referred also to *Rex v. Mashiter* (d) and *Rex v. Tunstead* (e).

*Ryland* contra. The act meant to charge those persons only who resided within the parish so as to have spiritual assistance, and for this end it uses the phrase "inhabitants and occupiers," that is inhabitant occupiers, or in other words residents, and this appears plainly from the subsequent provision. [*Patteson J.* Before this act a non-resident occupier would have had to pay tithes, and the act does not expressly exempt him from the church rate which is substituted for tithes.]

*Cur. adv. vult.*

(a) 5 Rep. 66 b.

R. 340.


(b) Cro. Eliz. 659.

(d) 1 N. & P. 314.

(c) 4 B. & C. 778; S. C. 7 D. &

(e) 3 T. R. 523.

1840.

  
 The QUEEN  
 v.  
 WILSON.  
 Poor rate.

Lord DENMAN C. J. now delivered the judgment of the Court upon both the above cases:—There were two cases argued during the present term, in which the defendant was rated to the poor, and to a rate raised under a local act for certain purposes connected with the church, in respect to the occupation of a house devoted entirely to charitable and religious purposes, that is to the uses of the London Missionary Society.

It was argued that, though the sessions had found that general fact, the charity being evidently all administered in foreign parts was not such as our law could recognize. But, supposing this to be so, we think this appellant is protected from liability to a poor rate by the authority of those decisions which require it to be imposed on the beneficial occupier. Here is neither benefit nor occupation, according to the language of those cases and particularly the case of *Rex v. Waldo(a)*, which has frequently been recognized, and is in its circumstances extremely like the present.

The Order of Sessions must therefore be quashed and the rate amended.

Order of Sessions as to the poor rate quashed.

Church rate.

The other rate stands upon different ground. It is made under an act of parliament passed in 6 Geo. 4, for extinguishing tithes in the parish of St. Botolph, Bishopsgate. That act gives the rector a regular stipend in lieu of tithes; and for raising that sum directs that the vestry shall once a year make a rate upon all persons inhabitants and occupiers of land, tenements, or hereditaments, and premises within the parish, except the rector.

The defendant in this case represents the London Missionary Society, who are unquestionably the occupiers of premises within the parish, and come directly within the words and meaning of the act in question. The cases

(a) Cald. 358.

respecting beneficial occupation with regard to poor rates do not apply to this act.

The Order of Sessions must be affirmed.

1840.

The QUEEN  
v.  
WILSON.

Order of Sessions as to the church  
rate affirmed.

The QUEEN v. WOOLMER and another.


Tuesday.  
June 16th.

A RULE nisi for a criminal information had been obtained against the defendants as publishers of a libel contained in a newspaper. The rule was drawn up on reading the affidavits of certain persons, who stated that they had read the alleged libel in a newspaper, which was described in their affidavits, and purported to be published by the defendants; and on reading an affidavit authenticating a certified copy of the declaration of the defendants delivered at the stamp office, conformably to the 6 & 7 Will. 4, c. 76. The descriptions of the newspaper in the first mentioned affidavits, and in the copy of the declaration from the stamp office, corresponded to each other. A newspaper of the same description was also used by counsel on moving for the rule, and was handed up to the Court, and afterwards returned; but it was not annexed to the affidavits, nor made an exhibit, nor filed, nor was the rule drawn up on reading it.

A rule for a criminal information against the publishers of a newspaper libel must be drawn up on reading the newspaper, and the newspaper must be filed; otherwise the Court will discharge such a rule, although properly granted on production of a certified copy from the stamp office, under 6 & 7 Will. 4, c. 76, s. 8, of a declaration by the defendant that he is publisher of a newspaper therein described, and on production of a newspaper corresponding to it, which contains the libel.


*Thesiger* and *Butt* shewed cause, and took a preliminary objection that the evidence of publication by the defendants was incomplete. It will not be contended that the proof is complete at common law, but the 6 & 7 Will. 4, c. 76, s. 8, will be resorted to. By sect. 6 of that act any person is subject to a penalty who prints or publishes a newspaper before he has delivered to the commissioners of stamps and taxes a declaration setting forth correctly the title of his newspaper, a description of the house where it

1840.

  
The QUEEN  
v.  
WOOLMER.

is to be printed and published, and the names and additions of the printer and publisher, &c. The 8th section then provides, that "in all proceedings and upon all occasions whatsoever, a copy of such declaration, certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any and every person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly signed and made according to this act, and of the contents thereof;" "and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against any person having signed and made such declaration, and a newspaper shall afterwards be produced in evidence, intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher and the place of printing shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration, or shall purport to be the same, whether such title, name and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, informant, or prosecutor in any action, prosecution or other proceeding, to prove that the newspaper to which such action &c. may relate was purchased of the defendant, or at any house, shop or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold." Here one part of the statutory proof has been adopted by the production before the Court

of a certified copy of the stamp office declaration, stating that the defendants are the publishers of the newspaper in question ; but the other part of the statutory proof, which is made to consist in the production of a newspaper corresponding to that described in such declaration, has been omitted. Although a newspaper was read to the Court when this rule was applied for, yet it has not been “ produced in evidence,” for it has not been annexed to the affidavits filed on that occasion, nor filed with them, nor made an exhibit. On this point they referred to *Rex v. Baldwin* (a), *Rex v. Franceys* (b), and *Rex v. Donnison* (c). Even if the rule was properly granted, which may be admitted as far as the Court is concerned, inasmuch as a newspaper, corresponding to the newspaper in the certified copy of the declaration, was read, yet the rule must now be discharged, for it has not been drawn up on reading such newspaper ; *Sherry v. Oke* (d).

1840.  
  
 The QUEEN  
 v.  
 WOOLMER.

Sir J. Campbell A. G., Sir F. Pollock and Cockburn contra, contended that the rule had been granted on sufficient materials, as the Court had had ocular inspection of a newspaper corresponding to that described in the stamp office declaration, and that, as the same newspaper which was used in moving for the rule was again before the Court, the rule must be made absolute. They also contended that it had never been the practice to file the newspaper in such cases, or to file any document, unless annexed to the affidavits, or made an exhibit.

LORD DENMAN C. J.—I think the evidence is insufficient. We cannot look at the case except through the medium of affidavits. There is no affidavit before us verifying any newspaper which answers the newspaper described by the

(a) 8 A. & E. 168 ; S. C. 3 N. & M. 251.  
 & P. 342. (c) 4 B. & Ad. 698.  
 (b) 2 A. & E. 49 ; S. C. 4 N. (d) 3 Dowl. P. C. 349.


1840.

~  
The QUEEN  
v.  
WOOLMER.

defendants in their declaration at the stamp office. The requisites of 6 & 7 *Will.* 4, c. 76, s. 8, have not been complied with. The newspaper containing the alleged libel has not been “produced in evidence;” the best way of doing this would be, that the self-same newspaper which has been used in moving for the rule should be sworn to and annexed to the affidavits, or at least that the newspaper should be filed with the affidavits. I may here remark that I do not admit it would be sufficient to prove an extract or a copy of the newspaper proceeded against; I should wish to see the original newspaper or have it accounted for, as we have to perform the office of a grand jury. And it is essential that the rule should be drawn up on reading the newspaper. I apprehend that no rule can be discussed with reference to documents which are not referred to in the rule itself. With regard to newspapers, we ought to be most particular in guarding against the possibility of the newspaper produced before us, on shewing cause, being different from that employed on moving for the rule. None of the cases cited would justify us in holding the evidence in this case to be sufficient, and this rule must be discharged.

LITLEDALE J.—I am of the same opinion. A newspaper is referred to in the affidavits, and a newspaper is handed up to the Court, but the newspaper so shewn to the Court is not afterwards annexed to the affidavits, nor verified by them, which would be sufficient, nor made an exhibit. The newspaper is merely produced for the time, and is then taken away; that is not sufficient. We are in the same situation with a grand jury, before whom the newspaper, which is the foundation of their proceedings, should certainly be brought. In practice, all that we now hold to be necessary may not be done in these cases; but still, when objection is taken to the regularity of proceedings, however customary, we must consider and give it due effect.

Another objection is, that the rule is not drawn up on reading the newspaper, which is the foundation of this proceeding. That objection is most important; it is right that a defendant should have the opportunity of knowing, from the newspaper itself, exactly what he has to answer.

1840.  
  
 The QUEEN  
 v.  
 WOOLMER.

PATTERSON J.—It has been attempted to prove this case partly according to the statute and partly according to common law. I do not think this can be done. This rule was properly granted, upon production before the Court of the affidavits, the certified copy, the defendant's declaration, and a newspaper corresponding to that of which the defendants there appear to have declared themselves the publishers. But it is not enough to obtain a rule on proper materials; the rule must also be properly drawn up, for, in general, nothing can be referred to on shewing cause unless the rule is drawn up on reading it. It seems the practice is not to receive or file any thing that is not immediately connected with the affidavits; but perhaps there should be an exception in cases of this kind, where the statute makes it sufficient that the newspaper described in the certified copy of the declaration should be produced in evidence. But this rule is not drawn up on reading the newspaper—that is a fatal defect. Even if it had been sworn that the newspaper had been purchased of the defendants, this would not do, unless the rule is drawn up on reading the newspaper.

Rule discharged.

**DOE *d.* DAVIES *v.* DAVIES.**

**IN** this ejectment the defendant had given the lessor of the plaintiff notice to admit certain documents, and in who refused to admit certain documents, should pay the costs of proving them, if they should be proved to the satisfaction of the judge at the trial. The judge certified that they had been so proved. The plaintiff was nonsuited, but obtained a rule nisi for a new trial. The Court refused to direct the Master to tax the costs of proving the documents before the rule for a new trial had been disposed of.

*Thursday,*  
*May 28th.*

An order was made that the plaintiff,



1840.



DOE  
d.  
DAVIES  
v.  
DAVIES.

consequence of his refusal had obtained an order of Lord *Denman* C. J. that the plaintiff should pay the costs of the proof at the trial, if the documents should be proved to the satisfaction of the judge who should try the cause. At the Cardiganshire summer assizes, 1839, before *Gurney* B., the defendant proved the documents in question, and the learned Baron duly certified that they were proved to his satisfaction. The plaintiff was nonsuited.

The lessor of the plaintiff obtained a rule nisi for a new trial in the ensuing Michaelmas term.

*E. V. Williams*, on an affidavit stating the above facts, and that the costs of proving the documents were very large, and that there was danger of the defendant losing the costs if he were obliged to wait till the rule in the new trial paper was disposed of, now moved for a rule nisi, calling upon the Master to proceed to the taxation of these costs, and contended that, as the costs were made payable upon a condition which had been performed, the defendant was entitled to them immediately.

PER CURIAM, there is no reason why these costs should be taxed before taxation of the costs in the cause. It may ultimately come [to a question of set-off between the parties, and it is more convenient that the taxation should proceed all at once.

Rule refused.



Wednesday,  
June 10th.


DOE d. THOMPSON v. HODGSON.

1. In ejectment by landlord against tenant, the plaintiff may give evidence of mesne profits, under 1 Geo. 4, c. 87, s. 2, although he has not given notice of trial.

**EJECTMENT.** At the trial before Lord *Denman* C. J. at the London sittings after last Easter term, it appeared

2. Where a party served with notice to produce refuses to produce the document, when called for at the trial, and secondary evidence has been given of its contents, he cannot afterwards produce the document as his own evidence.

that the action was brought by a landlord against his tenant, to recover premises in Cheapside. To prove the title of the lessor of the plaintiff, the counsel of the plaintiff proved a notice to produce, and called for various receipts for rent mentioned therein; but the defendant declined to produce them. The counsel for the defendant, in his speech to the jury, proposed to read these receipts; but his lordship was of opinion that he could not do so after having declined to produce them. The plaintiff went into evidence of mesne profits under 1 Geo. 4, c. 87, s. 2. This course was objected to on the ground that plaintiff had not proved notice of trial as required by the statute. Verdict for plaintiff, with damages for mesne profits.

1840.  
  
 Don  
 d.  
 THOMPSON  
 v.  
 HODGSON.

*R. V. Richards*, on a former day in this term (a), moved for a rule nisi for a new trial. First: Mesne profits can only be recovered in an action of ejectment between landlord and tenant where notice of trial has been given. The 1 Geo. 4, c. 87, s. 2, enacts that whenever it shall appear on the trial that the tenant has been served with due notice of trial, the consent rule is to be evidence of lease, entry and ouster, "and the judge before whom *such* cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof." The words *such trial* means the trial before mentioned, viz. where the tenant has been served with due notice. 2. No case shews that a document in the hands of a party cannot be made evidence merely because he has declined to produce it when called for. The only effect of the refusal is to allow the other side to go into secondary evidence. If that evidence is unsatisfactory, then the op-

(a) May 27th, cor. Lord Denman C. J., *Littledale, Patteson and Williams Js.*

1840.  
 ~~~~~  
 DOE  
 d.  
 THOMPSON  
 v.  
 HODGSON.

posite party may contradict it, by producing the original document, which is like calling one witness to contradict what has been sworn to on the other side. In *Sayer v. Kitchen* (a) Lord Kenyon C. J. held that, if a party called for documents and inspected them, but did not put them in, it did not make them evidence for the other side; though a contrary dictum was laid down by Park J. in *Wilson v. Bowie* (b); and in *Doe v. Cockell* (c) it was held that a party, when called on to produce a document, must produce it when called for, or never; but none of these cases touch the present point. If the defendant is to be prevented from putting in the document as his own evidence, it may often lead to a failure of justice.

Lord DENMAN C. J.—We are all of opinion that the words *such trial* in the 1 Geo. 4, c. 87, s. 2, mean nothing more than a trial of ejectment between landlord and tenant, and that in any such case, when the landlord has proved his right to recover, he may proceed to give evidence of mesne profits without proof of notice of trial. On the other point we wish to take time to consider.

*Cur. adv. vult.*

As to the other point,

Lord DENMAN C. J. now said—The Court was of opinion that the defendant, having refused to produce the receipt when called for by the plaintiff, could not be allowed to produce it afterwards.

Rule refused.

(a) 1 Esp. 209.

(c) 6 C. & P. 528.

(b) 1 C. & P. 10.



1840.

## ATKINS v. KILBY and WYATT (a).

**TRESPASS** for assaulting and imprisoning the plaintiff. The declaration stated that the defendants assaulted the plaintiff, and imprisoned him, and forced him to go from Torquay in Devonshire along divers highways to Bishop's Waltham in Hampshire, and thence along divers other highways to the House of Correction at Winchester, and there imprisoned him until he was obliged to pay 18*l.* 5*s.* to the keeper of the House of Correction to obtain his discharge, whereby &c.

At the trial before *Parke* B. at the Devon summer assizes, 1838, the following appeared to be the facts of the case. Some time previous to the transaction in question, an order of filiation and maintenance had been made by certain magistrates of the county of Hants upon the plaintiff, who resided at Bishop's Waltham in that county. In July, 1836, the payments, which the plaintiff had been ordered to make, being in arrear, he was summoned and appeared before the magistrates, when he refused to pay. The magistrates gave him a month's time to consider, and on the expiration of that period issued a warrant for his commitment to the House of Correction at Winchester. The warrant recited that the plaintiff was present before them to answer the complaint, and required the constable in the

The defendant, a constable, justified the assault and imprisonment of the plaintiff under a magistrate's warrant of commitment. It was objected to this warrant that it erroneously recited that the plaintiff was then present to hear the complaint against him, although he was in another county, and that on the indorsement of it for execution by a magistrate of the county where the plaintiff was, it did not appear that the handwriting of the committing magistrate had been proved according to 24 *Geo.* 2,

(a) Decided in Easter term last (May 13th).

c. 55, s. 1. Held, that, if these objections to the warrant were tenable, they shewed "defect of jurisdiction" in the magistrates, but did not deprive the constable of the protection given him by the warrant under 24 *Geo.* 2, c. 44, s. 6.

The defendant, a constable, who had taken the plaintiff to gaol, under a magistrate's warrant, was called upon, under 24 *Geo.* 2, c. 44, s. 6, for a copy of the warrant and perusal of the original. The defendant gave the plaintiff a copy, but was unable to grant a perusal of the original, because it was retained by the gaoler for his own protection. The plaintiff, on information of this circumstance, made no objection to its non-production. Held, that he had dispensed with the production of the original.

A constable, who is conveying a party to prison under a magistrate's warrant, under 49 *Geo.* 3, c. 68, for non-payment of a certain sum, under an order of filiation and maintenance, is not bound to discharge his prisoner on tender of that sum.

1840.

ATKINS  
v.  
KILBY.

usual form (*a*) to convey the plaintiff to gaol, and the gaoler to keep him there for three months, unless he should sooner pay the sum of 18*l.* 5*s.*, the amount of the arrears, to one of the overseers of Bishop's Waltham. This warrant was delivered to the defendant *Wyatt*, a constable of the county of Hants, who went to Devonshire, where the plaintiff then was, to execute it. *Wyatt* having got the warrant indorsed by a Devonshire magistrate in the following form :—" I hereby authorize the within-named constable of Bishop's Waltham to execute this warrant in the county of Devon, and also *Charles Kilby &c.* (the other defendant) to assist &c.," left the warrant with *Kilby*, who executed it by apprehending and conveying the plaintiff from Torquay in Devonshire to Bishop's Waltham, where he handed him over to *Wyatt*. The plaintiff tendered the 18*l.* 5*s.* both at Torquay and at Bishop's Waltham, which they refused to accept. He was then conveyed to the House of Correction at Winchester.

The plaintiff before action demanded a perusal and copy of the warrant under 24 *Geo.* 2, c. 44, s. 66. The defendants furnished him with a copy, but informed him that they were unable to give him a perusal of the original warrant, because the gaoler, according to his usual practice, had retained it for his own protection. It appeared that the plaintiff was aware of this, and that he made no objection.

The counsel for the plaintiff on these facts contended that he was entitled to a verdict on the grounds, first, that perusal of the warrant had not been granted under 24 *Geo.* 2, c. 44, s. 6; secondly, that the warrant was illegal, as it appeared on the face of it that the warrant was granted a month after the plaintiff had left the county of Hants, and that he had not appeared personally before the magistrates when it was granted; thirdly, that no proof of the handwriting of the justices who made the order appeared on the indorsement; fourthly, that the tender ought to

(*a*) See 1 Burn's Just. by D'Oyly & W. p. 395.

have been accepted; and lastly that, even if the warrant were good, the plaintiff had been conducted to prison by a circuitous route. The learned baron left it to the jury to say whether the plaintiff had been taken by the most convenient route, and on their finding this in the affirmative, he directed a verdict to be entered for the defendants, with leave for the plaintiff to move to enter it for himself on the above points, and the jury, under the direction of his lordship, assessed the damages conditionally at 5*l*.

*Crowder* having obtained a rule accordingly in the ensuing Michaelmas term,

*Erle* and *C. Saunders* shewed cause in Hilary term last (a). 1. On looking at the whole tenor of 24 *Geo. 2*, c. 44, it is clear that its enactments have been complied with. A copy of the warrant was given, and the best means of perusal of the warrant itself afforded which the defendant possessed. The refusal, which according to the act subjects a constable to an action, must mean a wilful refusal. 2 and 3. So far as regards the defendant it is immaterial whether the warrant was legal or not, because by the above act constables who act in obedience to a warrant are protected, "notwithstanding defect of jurisdiction in the justice" issuing the warrant. 4. A constable has no power to accept the tender, his duty is simply to obey the injunctions in the warrant.

*Crowder* and *Butt* contra. 1. Unless the defendant can shew that he has complied with the conditions expressed in the 24 *Geo. 2*, c. 44, he cannot take advantage of the statutory defence given by it. The act requires expressly that perusal of *the warrant* shall be granted. A constable who makes an arrest ought to keep the warrant for his own

(a) Jan. 18th, before Lord Denman C. J. and *Littledale*. *Cole-ridge J.* had left the Court during the argument, and *Williams J.* was absent on the special commission at Monmouth.

1840.

ATKINS  
v.  
KILBY.

protection. If he do not, he must take the consequences. No case can be found in which it has been held that a copy of the warrant, or any excuse for the non-production of it is sufficient. Besides, as the justices could not have been joined with the defendants in the action, the warrant is no defence; *Sturch v. Clarke* (a), *Cotton v. Kadwell* (b). 2. As to the tender, there is likewise no authority for contending that the constable cannot receive the money when offered. *Robson v. Spearman* (c) shews that the intention of the 49 Geo. 3, c. 68, was to give the party committed the option either of paying the money or of being imprisoned for three months. Now as the three months' imprisonment commences from the day of arrest, a party cannot have this option if the constable is not authorized to receive the money. The case therefore ought to have been considered as if the money was paid at Bishop's Waltham, and the duress of the plaintiff after that time was false imprisonment (d).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action for assault and false imprisonment at Torquay and other places, ending with the House of Correction at Winchester, obliging plaintiff to pay 18*l.* 5*s.* and forcing him to incur expenses. The plea was not guilty. The trial was before our brother *Parke* at Exeter, and, a verdict having passed for the defendants, a motion was made to have it entered for the plaintiff for 5*l.* on some points reserved, or for a new trial.

The cause of action arose out of the apprehension of the plaintiff at Torquay, on a warrant granted by two magistrates for non-payment of money alleged to be due under an order of filiation, for the refusal to accept the money

(a) 1 N. & M. 671.

(b) 2 N. & M. 399.

(c) 3 B. & A. 494.

(d) They also contended that the warrant was illegal, from the want of jurisdiction of the Devon

justices and of the proof of the handwriting of the Hants justices who made the order, but the judgment of the Court makes it unnecessary to give the argument on these points.

claimed, until the plaintiff had been lodged in the House of Correction, and for carrying him thither by a circuitous route.

Several objections were made on the part of the plaintiff, which went to the validity both of the original warrant and of the indorsement thereon. Upon these, however, it is unnecessary for us to express any opinion, as they all resolve themselves, even if well founded, into a want of jurisdiction in the magistrates granting and indorsing the warrant, which will not the less avail to the protection of the defendants, who were constables, if they acted in obedience to it, and complied with a demand of perusal and copy of it duly made before action brought. For the statute 24 Geo. 2, c. 44, s. 6, expressly extends to cases in which the justices have acted without jurisdiction, and Lord *Eldon*, in his judgment in *Price v. Messenger (a)*, says, "the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted the warrant *without having jurisdiction*, as where the warrant which he has granted is improper."

Now, with respect to the demand of a perusal and copy of the warrant, no question was made but that a copy was duly given, but, upon a demand for the perusal of the warrant itself being made, it was answered that the original could not be produced, for it had been taken by the keeper of the Bridewell at Winchester, and he, being called, proved that he always took and kept the warrant when a prisoner was brought to his custody, and that he had done so in the instance in question. It was further admitted, by the witness who made the demand on the part of the plaintiff, that upon his receiving this answer he made no objection to the non-production, and that he was aware that the original was with the keeper of the Bridewell, as stated by the defendants. The statute, therefore, was not literally complied with, but we think that under the circumstances a literal compliance must be taken to have been dispensed with. The

(a) 2 B. & P. 158.



1840.

ATKINS  
v.  
KILBY.

demand of a perusal of the warrant was made by the agent of the plaintiff, and his conduct was such as to lead to the belief that the delivery of a copy under the circumstances was all that was required. But for this, steps might have been taken to procure the original, and the plaintiff cannot therefore rely on its non-production to oust the defendants of the protection of the statute.

The only remaining question is, whether the defendants acted in obedience to the warrant? Now that required them to convey the plaintiff to the Bridewell, and there deliver him to the keeper thereof; they had no authority to discharge the plaintiff or to receive the money at any intervening place, and the only doubt on this part of the case could properly be whether they had conveyed him by a circuitous route and thereby subjected him to unnecessary inconvenience or exposure. The jury however have found that they carried him by the most convenient road, and we see no reason for disturbing their verdict.

It follows, therefore, that the defendants are well protected by the warrant, and that the verdict was properly directed to be entered for them.

The rule therefore must be discharged.

Rule discharged.

Monday,  
June 23rd.

MITCHELL v. FOSTER.

Where it appeared, on the face of a conviction for an offence against the excise laws, that the plaintiff had

been summoned on the 20th September to appear before the defendant on the 30th September; and, the plaintiff not appearing on that day, that the defendant proceeded to hear evidence, and convicted him in a penalty of 5*l.*; the Court held the conviction to be null and void, and the defendant liable in trespass for issuing a distress warrant, as the excise act (4 and 5 *Will.* 4, c. 51, s. 19) requires that "ten days notice at least" shall be given to the party to appear, and the rule is inflexible to construe such limitation of time as ten *clear* days.

**TRESPASS** de bonis asportatis. Plea (of 3d March, 1837), not guilty. At the trial before *Tindal* C. J. at the Cambridgeshire spring assizes, 1839, it appeared that the defendant was a justice of the borough of Cambridge, and

that the plaintiff had been convicted by him and another justice (who died before action brought) in a penalty of 5*l.* under the excise laws; in default of payment of which sum, the goods mentioned were seized under a warrant of distress from the defendant. The plaintiff put in the conviction, and contended that it was bad, because (among other defects) it appeared on the face of it that the plaintiff was summoned on the 20th September, 1836, and the conviction took place on the 30th September, and therefore that the "ten days at the least" before the time appointed in such summons had not elapsed, according to the provisions of 4 & 5 *Will.* 4, c. 51, s. 19. It was contended for the defendant that this objection did not make the conviction void, but was matter for appeal to the quarter sessions, under the 7 & 8 *Geo.* 4, c. 53, s. 82. The Lord Chief Justice reserved the point, and the verdict passed for the plaintiff, damages 5*l.*


1840.  
  
 MITCHELL  
 v.  
 FOSTER.

Sir *J. Campbell* A. G. having obtained a rule nisi, in the ensuing Easter term, to set aside the verdict and enter a nonsuit,

*B. Andrews* (with whom was *Gunning*) now shewed cause. It is admitted that, if the conviction is bad, the defendant was without jurisdiction, and that the verdict for the plaintiff must stand. It appears on the face of the conviction (a) that ten clear days had not elapsed between the summons and the conviction; according, therefore, to the fixed rule now adopted by the Court, in the matter of

(a) The conviction set out that on the 20th Sept. 1836, *J. S.* officer of excise, personally appeared before *J. E.* Esq. and laid the information against plaintiff, "whereupon the said *Thomas Mitchell* (plaintiff) having been duly summoned to appear, and to answer the said charge *this day* before such of his Majesty's justices &c. did not

appear before us, *T. U.* Esq. and *E. F.* Esq. (defendant), now present, to wit, on the 30th day of Sept. 1836, pursuant to the said summons," and then stated that the justices on that day proceeded to hear the evidence (setting it out), and convicted the plaintiff in a mitigated penalty of 5*l.*

1840.  
  
 MITCHELL  
 v.  
 FOSTER.


*Prangley (a)*, *Blunt v. Helsop (b)*, and *Reg. v. The Justices of Salop (c)*, that *ten days at the least* mean ten clear days, the defendant was entirely without jurisdiction, as that of course does not accrue until the period mentioned in the statute has expired.

[He was then stopped.]

Sir J. Campbell A. G. and Storks Serjt. *contrà*. 1. The rule of Court *Reg. Gen. Hil. 2 Will. 4*, No. VIII. lays down expressly that in all cases in which any particular number of days, not expressed to be clear days, is prescribed, the same shall be reckoned exclusively of the first day, and inclusively of the last day, and *Morly v. Vaughan (d)* shews that the same construction was given to the words "fourteen days at least," when occurring in an act of parliament. The words "ten days at least" in the 4 & 5 *Will. 4*, c. 51 were employed after the rule of Court had been so laid down, and therefore the construction must be according to that rule, and not according to the decisions, which have been given with respect to parish appeals and attornies' notices. 2. The objection, if good, does not make the conviction null and void, but voidable only, and therefore the conviction not having been appealed against is a defence to an action of trespass; *Gray v. Cookson (e)*. Suppose the objection had been made before the defendant at the time, and that he, deciding according to the best of his judgment, had overruled it; that decision might be erroneous, but would be a decision on a subject-matter within his jurisdiction, and therefore not a nullity. So again, the sessions might have confirmed his decision, and, as they are competent to decide both upon law and facts, it cannot be contended that the proceeding would have been *coram non judice*. The distinction is that, where justices have no jurisdiction at all, all is void; but where they have a general jurisdic-

(a) 4 A. & E. 781; S. C. 6 N. & P. 286.	
& M. 421.	(d) 4 Burr, 2525.
(b) 3 N. & P. 553.	(e) 16 East, 13.
(c) 8 A. & E. 173; S. C. 3 N.	

tion over the subject-matter, however erroneous their decision may be in point of law, it is not thereby void ab initio. Suppose the plaintiff had appealed in this case, and the conviction had been quashed, then in case of action brought against the defendant, the plaintiff could only have recovered twopence damages and no costs under 43 Geo. 3, c. 141, unless he had proved malice and want of probable cause. But on what ground is the plaintiff entitled to put the defendant in a worse position by bringing an action at once without appealing?

1840.  
  
 MITCHELL  
 v.  
 FOSTER.

LORD DENMAN C. J.—It appears to me to be quite clear, on the defendant's own shewing, that he was without jurisdiction, as the act expressly provides that the party is to be summoned to appear ten days at the least before the time appointed in such summons. If then the ten days' summons is not given, it is just as if he had been convicted the day after the information had been exhibited, and without any summons at all. The defendant therefore assumed a jurisdiction which he did not possess, for, with regard to the ten days, the case of *Reg. v. The Justices of Salop* (a) shews that the rule is now clearly established that so many days "at the least" mean so many clear days.

PATTESON J.—*Reg. v. Salop* (a) is quite in point, and although it might have been supposed at the time of passing 4 & 5 Will. 4, c. 51, that the rule was to reckon one day exclusive and one day inclusive, yet, as we have laid down a clear rule since as to the mode, in a case like the present, of computing time, it is far better to adhere to it strictly on all occasions. Then as to the jurisdiction of the defendant, it is clear that he had none, if the plaintiff was not bound to appear before him till ten clear days after he had been summoned. It is curious that this act which requires a notice in writing of the information as well as a

(a) 8 A. & E. 173; S. C. 3 N. & P. 286.

1840.

MITCHELL  
v.  
FOSTER.

summons to appear, to be served on the party, provides that the summons may be added to the notice, or be served separately according to circumstances; and I should have thought that any one, on the most cursory perusal of the act, must have seen that it never was intended to drive the party charged so close as the actual ten days mentioned as the limit.

WILLIAMS J.—The Attorney-General contends that it is sufficient if the justice has jurisdiction generally over the subject-matter of the complaint, but that is not so, for he must also have jurisdiction over the particular case to which the statute applies. I cannot read this section without forming a clear opinion that, unless ten clear days elapse, between the summons and the hearing, the jurisdiction to convict does not arise.

Rule discharged.

The QUEEN v. The Trustees of OXFORD and WITNEY  
ROADS.

Tuesday,  
June 16th.

Mandamus  
does not lie to  
compel the  
repair of a  
turnpike road.

THIS was a rule calling upon the Trustees of the Oxford and Witney Turnpike Roads to shew cause why a writ of mandamus should not issue, commanding them to repair and keep in repair a certain part of the said road between the church of St. Peter le Bailey in the city of Oxford and leading thence over Pacey's Bridge to the Holly Bush Inn in the county of Oxford &c.

The application was made at the instance of the Commissioners for paving and lighting the city of Oxford.

Sir *W. W. Follett* (with whom was *Butt*) shewed cause, and contended that the affidavits in support of the rule did not state with sufficient distinction that the trustees were liable to repair the road in question. [Lord *Den-*

*man* C. J. Is there any direct authority that a mandamus will lie at all to trustees of a turnpike road to repair it?]  
He was then stopped.

1840.  
The QUEEN  
v.  
The Trustees of  
OXFORD and  
WITNEY  
ROADS.

*Talfourd* Serjt. (with whom was *Keating*) in support of the rule. Although there may not be any direct authority, yet analagous cases of mandamus are to be found. In *Rex v. Commissioners of Llandilo Road* (a) the proceeding by mandamus was not objected to. It is doubtful whether an indictment will lie. [Lord *Denman* C. J. The best mode of proceeding is to indict the parish, who can then have the fine apportioned under the 3 *Geo.* 4, c. 126, s. 110. This was the course pursued in a case before us a few days since, *Rex v. Inhabitants of Barnard Castle* (b). It is quite clear a mandamus will not lie in this case.] In the present case there is a bridge built by these trustees, the road over which is also out of repair.

LORD DENMAN C. J.—It is quite clear a mandamus will not lie in such a case. The rule must be discharged.

LITTLEDALE and PATTESON Js. concurred.

Rule discharged.

(a) 2 T. R. 232.

(b) Not reported.

### EDDEN v. WARD.

Tuesday,  
June 17th.

GRAY obtained a rule nisi to set aside the replication of the common similiter, on the ground of irregularity. The irregularity alleged was, that it had no date, and therefore did not comply with 1 Reg. Gen. H. T. 4 Will. 4 (pleading within Reg. Gen. H. T. 4 Will. 4, r. 1, so as to require to be dated. The common similiter, whether added by a party for himself or his adversary, is not a pleading

1840.



EDDEN  
v.  
WARD.

rules), which requires every pleading to be entitled of the day of the month and year when the same was pleaded. The declaration was against the acceptor of a bill of exchange, and contained a count for goods sold. Pleas: that defendant did not accept the bill, and non assumpsit to the other count, were delivered on the 9th June. On the following day the plaintiff added the common similiter, and made up and delivered the issue.

*Erle* shewed cause, and contended that the regular practice was not to date the common similiter, and that, even if the practice were erroneous, the plaintiff had been guilty of a mere clerical error, which the defendant should have applied to a judge at chambers to amend at the plaintiff's costs: *Ikin v. Plevin* (a).

*Gray* contra. The rule requiring pleadings to be dated does not apply where one party adds the similiter for another, *Shackel v. Ranger* (b); but there is a distinction in this respect, where the party adds a similiter himself: *Middleton v. Hughes* (c). The date of the similiter is of importance; it used to determine the term of which issue was joined, and does so still in replevin and ejectment, so that the time of moving for judgment as in case of a nonsuit is determined thereby.

Per CURIAM (d).—There appears to be no decision on the point. We think the similiter, whether added by a party for himself or for his adversary, is not a pleading within the meaning of the general rules, so as to require a date.

Rule discharged.

(a) 5 Dowl. P. C. 594.

(b) 3 M. & W. 409.

(c) 8 Dowl. P. C. 170.

(d) Lord Denman C.J., *Little-  
dale, Patteson and Williams* Js.



1840.

Tuesday,  
June 2d.

DAVIES v. STACEY and another.

REPLEVIN for taking goods of plaintiff in a dwelling-house, called the Six Bells Inn.

Avowry by *Stacey*, and cognizance by the other defendant, as his bailiff, that said goods were taken as a distress for half a year's rent, due on the 25th March, 1837, under a demise by *Stacey* to plaintiff, at the yearly rent of 40*l.*, payable 25th March and 29th September.

Pleas in bar: 1. Non tenuit modo et formâ, &c.

2. As to 2*l.* 10*s.*, parcel of said rent, riens in arrere.

3. As to 17*l.* 10*s.*, the residue, a tender &c.

Replication to third plea: that plaintiff did not tender modo &c. &c.

At the trial before *Gurney B.*, at the Carmarthen summer assizes, 1838, a lease of the premises to the plaintiff was put in, dated the 20th October, 1828, whereby the said "Six Bells" was demised for a term of twenty-one years, at the rent of 40*l.*, payable as in the avowry and cognizance mentioned.

Under the signatures to the lease were written the following words, "The allowance for the road to the Six Bells' yard to be made as usual." This was written before the execution of the lease by the parties. It further appeared in evidence that 5*l.* a year was usually paid by the plaintiff to a third person, for a right of road to the Six Bells, and that the sum of 2*l.* 10*s.* was allowed by the agent of the lessor half-yearly out of the rent, upon the production of a receipt from such third person.

*Chilton* and *J. Evans* now shewed cause. The terms respecting the allowance to be made by the lessor to the lessee having been introduced before the lease was executed,

Replevin.  
Avowry for 20*l.* as a half-year's rent in arrear. Pleas: 1. non tenuit; and 2. as to 2*l.* 10*s.*, riens in arrere.

At the foot of the indenture of lease, which expressed the rent of the premises demised to be 40*l.* a year, and before its execution were written the words "the allowance for the road to be made as usual." These words referred to an allowance (which had been usually made to the tenant of the demised premises) of 2*l.* 10*s.*, half-yearly, being a sum paid by him to an adjoining occupier for a right of way to the demised premises.

Held, that this allowance was, at most, a mere covenant, and not an alteration of the rent

so as to support the plea of non tenuit.

*Quere*, whether payment of the sum mentioned in the allowance supported the plea of riens in arrere.



1840.

DAVIES  
v.  
STACEY.

must be taken as incorporated in the lease itself. If the lease is so read, the pleas of non tenuit and of riens in arrear are supported; for the effect of the allowance agreed upon is, that the plaintiff did not hold at a rent of 40*l.*, but at 35*l.* a year; and that as to the 2*l.* 10*s.*, parcel of the 20*l.* avowed for as the half-year's rent, no part was due.

The allowance is part of the lease, and supports non tenuit. In *Burgh v. Preston* (a), a bond was conditioned to indemnify the obligee against sums which he should be liable to pay on the obligor's account; and, before the execution of the bond, it was indorsed "the obligee hath given an undertaking not to sue upon the bond until after the obligor's death." The words indorsed were held to be part of the condition, and to make the bond not payable until after the obligor's death. So in *Johnson v. Carre* (b) where to debt for rent by lessor and lessee, defendant pleaded in bar a covenant by the lessor, that the lessee might deduct so much for charges; the plea was held good on the ground that a party shall not be put to circuity of action. *Thompson v. Butcher* (c) is another authority to the same point.

As to the payment of the 2*l.* 10*s.* allowed for, being in evidence under riens in arriere, they cited *Woods v. Rock* (d) as an express authority, and also relied upon *Dyer v. Bowley* (e), *Carter v. Carter* (f), *Johnson v. Jones* (g), *Dale v. Sollett* (h), and *Le Loir v. Bristow* (i).

*Evans* and *E. V. Williams* contra. The allowance does not support non tenuit: *Mason v. Chambers* (k), which is thus given in *Com. Dig. Rent* (C 3), "If a rent of so much a year be reserved, but by the same deed the lessor agrees to allow so much at every payment for bringing the rent

(a) 8 T. R. 483.

(b) 1 Lev. 152.

(c) 3 Bulst. 300.

(d) 1 Alcock &amp; N. 57 (Irish).

(e) 2 Bing. 94.

(f) 5 Bing. 406.

(g) 1 P. &amp; D. 651.

(h) 4 Burr. 2133.

(i) 4 Camp. 134.

(k) Cro. Jac. 34; S. C. Yelv. 42.

1840.  
  
 DAVIES  
 v.  
 STACEY.

this shall not be recouped as a diminution or alteration of the rent, but is a covenant for allowance." Again, in *Burroughs v. Hays* (a), which was "covenant upon a demise for years rendering rent, and breach assigned for non-payment, defendant pleads that part of the rent was to be allowed &c. This is covenant against covenant, and judgment for the plaintiff" accordingly.

As to the plea of riens in arrere, where such a plea has been held to be maintained by proof of payment to a third person, as in *Sapsford v. Fletcher* (b), *Taylor v. Zamira* (c), and other cases, the payment has been made in respect of charges upon the demised premises, which the landlord was bound to satisfy, so that the payment was virtually to him. Even if money paid under an allowance, like the present, might be pleaded to an action of debt, it cannot be pleaded as to an avowry for distress, and cannot therefore be evidence under riens in arrere. The case of *Woods v. Rock* (d) does not appear to have been fully considered.

There was also a question raised, as will appear from the judgment of the Court, whether sufficient evidence had been given that the plaintiff had in fact paid the 2*l.* 10*s.*, of which he claimed the allowance in deduction of his rent.

*Cur. adv. vult.*

Lord DENMAN C. J. during the sittings after this term, delivered the judgment of the Court, and having stated the pleadings and the facts of the case, proceeded thus:—It was contended for the plaintiff, that "the allowance for the road," so written upon the lease as aforesaid, was virtually incorporated with it, and amounted, in law, to a covenant to make such allowance as a deduction from the rent, which, therefore, amounted only to the sum of 35*l.*, and not 40*l.*, as stated in the avowry and cognizance, and, consequently, that the plaintiff was entitled to a verdict upon

(a) Comb. 21.

(c) 6 Taunt. 524.

(b) 4 T. R. 511.

(d) 1 Alcock & N. 57 (Irish).

1840.  
  
 DAVIES  
 v.  
 STACEY.

the issue of non tenuit. Upon this point we are of opinion, however, that the answer given is satisfactory, and that the case of *Mason v. Chambers* (a) is an express authority to shew that such covenant (allowing it to be such) does not operate "as a defalcation of the rent," but is a mere covenant, and no alteration of the rent. We think therefore that the avowry and cognizance were proved as laid.

It was further argued for the plaintiff, that payments, made by him for such right of passage as aforesaid to the demised premises, might be given in evidence under the issue of riens in arrear, and entitle him to a verdict thereon; and upon this point the cases of *Sapsford v. Fletcher* (b), *Taylor v. Zamira* (c), and *Carter v. Carter* (d), were quoted at the bar. It is observable, however, that the ground rent in two of those cases, payable by the lessor to the superior landlord, and the annuity payable in the other, were *direct charges* upon the demised premises, or upon the lessor, or upon both. But, without further inquiring how far the cases are distinguishable, we are clearly of opinion that the fact of such payment having been made by the plaintiff was not established, and indeed that the contrary was proved.

The verdict therefore which has been entered for the plaintiff, damages 4*l.*, must be set aside, and a verdict must be entered for the defendants on the first and second issues, and for the plaintiff on the third.

Rule absolute accordingly (e).

(a) Cro. Jac. 34.

(b) 4 T. R. 511.

(c) 6 Taunt. 524.

(d) 5 Bing. 406.

(e) The reader will supply what has been omitted in the statement

of this case, viz. that the plaintiff had obtained a verdict on all the issues, and that a rule was afterwards obtained to enter the verdict generally for the defendants.



1840.

## The QUEEN v. SARAH VIRRIER.

Tuesday,  
June 16th.

THIS was an indictment against the defendant for perjury, alleged to have been committed on the trial of a petition before a committee of the House of Commons, complaining of the undue return of Mr. *Berkeley* as member of parliament for the city of Bristol, the said petition stating in substance that the said Mr. *B.* was guilty of bribery by himself and his agents at the election, and particularly of the corrupt application of certain charitable funds by his agents to procure his return. The indictment stated that shortly before the said election, to wit, on the 6th July in the first year &c., the said Mr. *B.*, with Mr. *T. Carlisle* and others, went to the house of *William Virrier*, to solicit his vote for Mr. *B.*; that a committee was duly appointed to try the matter of the said petition, and that the defendant (wife of the said *William Virrier*) appeared as a witness before the said committee, and that it became

An indictment for perjury contained three assignments. The first and third assignments being almost identical, the judge who tried the case, in summing up, for the sake of convenience, resolved the three assignments into two, and then directed the jury upon that assignment which stood second in the indictment as the first assign-

ment, and upon the assignments which stood first and third as together forming the second assignment. The jury found the defendant not guilty on the first assignment, and guilty on the second; meaning, as was admitted, to treat the assignments as they were treated in the summing up, and to find defendant guilty on the first and third, and not guilty on the second. The judge, on application, made an order to amend the *postea*, (from his recollection of what passed at the trial,) by entering the verdict for the crown on the first and third, and for defendant on the second assignment. But the Court, as a matter of discretion, thought that such an amendment should not be made from the judge's recollection.

An indictment for perjury alleged that a petition was presented to the House of Commons against the return of *B.* on the ground of bribery; that shortly before his election, to wit, on the 6th July, *B.* and *C.* went to the house of defendant to solicit his vote, that at the trial of the petition it was a material question whether at the *said time* when *B.* and *C.* went to defendant's house a certain act of bribery took place; that defendant was a witness sworn to speak the truth of and concerning the said premises, and that she deposed touching the said election and the matter of the petition, that, shortly before *B.*'s election, *B.* and *C.* came on a canvassing visit to defendant's house, and that the act of bribery then took place, (innuendo) thereby meaning that at the *said time* when *B.* and *C.* went to defendant's house as *aforsaid* the act of bribery was committed.

Held, on motion in arrest of judgment, 1st, That the allegation that defendant deposed "touching the said election," &c. sufficiently pointed to the matter, whereupon the defendant was sworn as a witness. 2nd. That the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shewn to refer to that particular time and no other.

1840.

The QUEEN  
v.  
VIRRIER.

and was a material question whether at *the said* time when Mr. *B.* and the said other persons went to the house of the said *William Virrier*, the said Mr. *Carlisle* said that he would give the said *William Virrier* 6*l.* out of the funds of one of the said charities at Christmas following, and whether at *the said time* the said Mr. *B.* put a sovereign into the hands of the defendant, and also whether the said *T. Carlisle* said he should not forget it was in his power to give her husband the said 6*l.* at Christmas; that the defendant *was sworn* to speak the truth of and *concerning the premises*. The indictment proceeded to state that the defendant *swore* before the said committee *touching the matters and merits of the said election*, and the matter of the said *petition* in substance and effect, that a canvassing party came to her husband's house, and that the said *T. Carlisle* said (amongst other things) that he would give him (the said *William Virrier*) the 6*l.* at Christmas, *thereby meaning that at the said time when the said Mr. B. and T. Carlisle and other persons so went as aforesaid to the house of the said W. Virrier, the said T. C. said he would give the said W. V. 6l. out of the funds of one of the said public charities, whercof the said T. C. was trustee*. The indictment also stated that the defendant swore that Mr. *B.* put a sovereign into her hand, and told her to give it to her husband, with a like innuendo, pointing the time to the said visit on the 6th of July; and that she further swore that Mr. *Carlisle* told her he should not forget it was in his power to give her husband the 6*l.* at Christmas, with a like innuendo, and upon these three several statements in her evidence perjury was assigned.

The case was tried before Lord *Denman* C. J. (Dec. 24), at the Middlesex sittings after Michaelmas term, 1838. His lordship, after calling the attention of the jury to the three assignments of perjury in the order in which they occur in the indictment, and observing that the first and third assignments, with respect to what the defendant deposed to as having been said by Mr. *Carlisle*, were much

the same, resolved the three assignments into two, for the more convenient consideration of them, and left it to the jury to say whether the defendant had committed perjury in deposing either that Mr. *Berkeley* gave her the sovereign, which he called the first assignment, or that Mr. *Carlisle* had promised her 6*l.*, which his lordship called the second assignment. As to her evidence with respect to the gift of a sovereign, his lordship impressed upon the jury that it would be dangerous to convict her of perjury, as the fact alleged by her was and could only be satisfactorily disproved by the direct testimony of *one* witness only, Mr. *Berkeley*.

1840.  
  
 The QUEEN  
 v.  
 VERRIER.

The jury found the defendant “not guilty” on the first assignment, and “guilty” on the second.

A summons was afterwards taken out before his lordship to enter the verdict for the crown on the first and third assignments, and for the defendant on the second. His lordship was attended by counsel on either side, and it being admitted that there had been no misunderstanding on the part of the jury, and that the proposed amendment would be in conformity with their meaning, his lordship allowed the amendment to be made.

In the following term *Stephen* Serjt. moved for a rule nisi to arrest the judgment, on the ground that the assignments of perjury were insufficient. The indictment states that there was a petition against Mr. *Berkeley*’s return on the ground of bribery, that before the said election the canvassing party came to the house of the defendant on the 6th July, that it became material to know whether certain acts were done by Mr. *Berkeley* at the *said* time when the canvassing party came to her house, and that she swore “touching the matters and merits of the said election, and the matter of the said petition,” “that before the said election a canvassing party (*meaning the said canvassing party*) came to her house,” and then that the said acts were done; and then it is stated in the assignment of perjury that these

1840.

  
The QUEEN  
v.  
VIRRIER.

acts were not done on the particular occasion ("at the said time,") of the canvassing party coming to her house. As therefore one particular time only, viz. the 6th July, is negatived, it is quite possible that those acts might have taken place at some other time, and if the innuendo, "meaning the said canvassing party," be struck out, it will be possible that the defendant might have spoken as to such other time, and not as to the 6th July, and so that no perjury was committed by her. The allegation that the defendant gave evidence "touching the matters and merits of the said election," does not sufficiently indicate the particular canvassing occasion, which alone is made material, and there is no colloquium that her evidence was given "of and concerning" that occasion, so that the innuendo goes beyond its proper office, and enlarges the meaning of the previous averments. On this point he cited *Rex v. Marsden* (a), and *Hawes v. Hawkey* (b).

He also moved for a rule to shew cause why the order of the Lord Chief Justice for amending the postea should not be rescinded, on the ground that such an amendment could not be made in a criminal case, citing *Rex v. Keat* (c), *Bold's case* (d), *Miller v. Trets* (e), *Spencer v. Goter* (f), *Rex v. Woodfall* (g), *Reg. v. Tuchin* (h), and 2 Vin. Abr. 369, Amendment, (H a). [*Littledale J.* referred to Vin. Abr. *ib.* (T a).]

A rule nisi having been obtained,

*Crowder, Adolphus* and *M. Chambers* shewed cause (i). As to the indictment, they referred to 1 Wms. Saund. 243, n.(4), *Rex v. Nicholl* (k), *Rex v. Horne* (l), *Reg. v. Rhodes* (m), and *Rex v. Aylett* (n).

(a) 4 Mau. & S. 164.

(b) 8 East, 427.

(c) 1 Salk. 47.

(d) 1 Salk. 53.

(e) 1 Ld. Raym. 324.

(f) 1 H. Bl. 78.

(g) 5 Burr. 2661.

(h) 2 Ld. Raym. 1061.

(i) On a former day in this term (June 4).

(k) 1 B. & Ad. 21.

(l) Cowp. 672.

(m) 1 Ld. Raym. 886.

(n) 1 T. R. 63.

As to the amendment, it is said that a verdict may be amended in civil but not in criminal cases, and *Rex v. Keat* (a), 2 Com. Dig. Amendment, (P) and (2 C 1), may be relied on for this distinction. But the other reports of *Rex v. Keate* (a) do not support the distinction between civil and criminal cases generally, as it appears in *Salkeld*. Three of the other reports (b) confine the distinction to cases of felony, and two of the reports (c) make no reference to the point at all. The true rule is, that, wherever an amendment might be made at common law in civil cases, it may also be made in criminal cases: *Reg. v. Tutchin* (d), *Odington v. Darby* (e), *Anonymous* (f), *Rex v. Hayes* (g), 2 Hawk. P. C. bk. 2, c. 47, s. 9, n. (h). They referred also to 1 Wms. Saund. 249, and *Rex v. Atkinson* there cited, 2 Vin. Abr. Amendment, (I a), *Plummes's case* (i), *Eddowes v. Hopkins* (k), *Rex v. Woodfall* (l), *Hankey v. Smith* (m), *Attorney-General v. White* (n), *Newcombe v. Green* (o), *Rex v. Grampound* (p), *Ernest v. Brown* (q), *Williams v. Breedon* (r). [Lord Denman C. J. mentioned *Empson v. Griffin* (s)]. *Rex v. Griepe* (t). The amendment may be made from the judge's recollection: *Eliot v. Skyppe* (u). The object of the amendment in this case is to express the admitted intention of the jury.

1840.  
  
 The QUEEN  
 v.  
 VIRRIER.

*Thesiger* contra, as to the first point, cited *Reg. v. Bowles* (x) and *Goldstein v. Foss* (y).

[As to the second point he was stopped by the Court.]

- |   |   |
|---|---|
| (a) 1 Salk. 47.                             | (m) Barnes' notes, C. P. 449.           |
| (b) Skinn. 666; Comb. 406; 1 Ld. Raym. 139. | (n) Bunb. 283.                          |
| (c) Holt, 481; 5 Mod. 288, and 12 Mod. 118. | (o) 2 Str. 1197.                        |
| (d) 1 Salk. 51.                             | (p) 7 T. R. 699.                        |
| (e) 2 Bulst. 35.                            | (q) 4 Bing. N. 162.                     |
| (f) 11 Mod. 84.                             | (r) 1 B. & P. 329.                      |
| (g) 2 Str. 843.                             | (s) 3 P. & D. 160.                      |
| (h) Curwood's ed.                           | (t) 1 Ld. Raym. 256.                    |
| (i) Palmer, 480.                            | (u) Cro. Car. 338.                      |
| (k) 1 Doug. 376.                            | (x) Cro. Eliz. 428.                     |
| (l) 5 Burr. 2661.                           | (y) 6 B. & C. 154; S. C. 9 D. & R. 197. |



1840.

The QUEEN  
v.  
VIRRIER.

LORD DENMAN C. J.—I think it cannot be laid down, as a proposition of law, that a judge has no power in any case to amend from his recollection of what passed at the trial. But I may say that generally it would be an inconvenient and dangerous practice to amend from recollection, and that in the present case we hold, as a matter of discretion, that the amendment ought not to be allowed, although it is admitted that there is no doubt about the meaning of the jury. The ordinary cases of amendment are where there has been a misprision with respect to some document.

PATTESON J.—I have no doubt that an amendment might be made in this case, though a criminal case, if we had the judge's notes to amend by.

LITTLEDALE and WILLIAMS Js. concurred.

Rule absolute on the first point.

As to the other,

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—Upon this indictment a motion has been made to arrest the judgment upon two objections. 1st. That the allegation of the oath having been taken, “touching the matters and merits of the said election, and the matter of the said petition,” did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence. And 2dly. That there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July.

We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was had; that a material question arose as to the existence of certain facts to which the defendant deposed, and was therein guilty of perjury. Now, although it is certainly true that the averment stating the oath to have been “touching and concerning the merits of the said elec-

tion, and the matter of the said petition," does not directly refer to what is alleged to be the material question which arose; yet where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation "touching and concerning," &c. is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore "as follows," &c.

The second objection is, that the evidence upon which the perjury is alleged to have been committed is not referred, with sufficient distinctness, to the said canvassing visit, and that the innuendo by which it is attempted so to apply it, introduces new matter, and is therefore bad. We, however, think otherwise, for an introductory averment expressly states that there was in fact such canvassing visit, and the innuendo directly refers thereto. It is plain therefore that this case comes within the rule laid down by Lord Chief Justice *De Grey*, in *Rex v. Horne* (a), which has always since been recognized as the true one, and that the innuendo does only point and fix the meaning to something previously averred, which is the proper office of an innuendo, and that it does in no respect enlarge it.

We think therefore that there is no ground for arresting the judgment.

Rule discharged.

(a) Cowp. 672.

1840.

The QUEEN  
v.  
VIRRIER.

1840.

## SITTINGS AFTER TRINITY TERM.

KNIGHT v. M'DOWALL and others.

Same v. Same.

Friday,  
June 19th.

1. Where a variance occurred at the trial of a replevin in the terms of the tenancy laid and proved, and the judge at nisi prius refused to amend, but directed the jury to find the facts specially, the Court have no power to give judgment according to the justice of the case, if the opposite party may have been prejudiced by the misstatement.

2. First plea, in bar to an avowry for rent arrear, tender of the rent claimed in the avowry; second plea, non tenuit:—Held, that proof of the tender as pleaded did not support the issue on non tenuit without calling in aid the allegations of the first plea, which cannot be done.

3. If the judge at Nisi Prius has refused to amend under 3 & 4 Will. 4, c. 42, s. 23, but has directed the facts to be found specially, and indorsed on the record, the Court has no power to strike out the indorsement.

THESE were two actions of replevin, tried before *Bosanquet* J. at the Leicestershire spring assizes, 1839. In the first action the defendants avowed &c., on a demise of premises at 30*l.* a year, payable half-yearly, on the 25th March and 29th September, and justified under a distress for 75*l.* 12*s.* for two years and a half arrears, due on the 29th September, 1838. The plaintiff pleaded in bar, 1st. that after the 29th September, 1838, and before the said time when &c., to wit, on 1st November, the plaintiff tendered and offered to pay to the defendants the said sum of 75*l.* 12*s.* 6*d.*, which the defendants then refused to accept and receive of and from the plaintiff, and that after the said tender, and before the said distress was made and taken as aforesaid, no request or demand of the said sum of 75*l.* 12*s.* 6*d.* was ever made by defendants. Verification. 2d. Non tenuit modo et formâ. In the second action the defendants avowed on a demise at 18*l.* a year, payable on the same days, and justified under a distress for 32*l.* 10*s.*, for two years and a half arrears, due on the 29th September 1838. Pleas in bar, 1st. tender of 32*l.* 10*s.*; 2d. non tenuit modo et formâ.

On the trial of the first action, the plaintiff proved a tender of 108*l.* 2*s.* 6*d.* to one of the defendants, and shewed by the record in the second action that this sum made up

the whole amount claimed (*a*); and that defendant refused to accept it, without assigning any reason. The defendant called no witnesses, and the learned judge told the jury that, if they were satisfied with the evidence as to the tender, they must find for the plaintiff on the first issue, and for the defendant on the second, as the fact of the tender proved the issue as to the tenancy. The jury found accordingly.

1840.  
  
 KNIGHT  
 v.  
 M'DOWALL.

The second action was then tried, and the plaintiff put in receipts of rent, by which it appeared that the holdings under both demises were from Michaelmas, old style (October 7th), and not from September 29th, as laid in the avowries. The defendant applied for liberty to amend the avowry, but the learned judge refused, and the verdict passed for the plaintiff on both issues, the jury finding specially, according to the direction of his lordship, that the holdings were from Michaelmas to Michaelmas, old style. The learned judge directed the finding of the jury to be indorsed on the record.

In the ensuing Easter term, *Balguy* obtained a rule for entering up judgment upon the 2d issue joined, according to the very right and justice of the case, under 3 & 4 Will. 4, c. 42, s. 24. *M. D. Hill*, in the same term, obtained a rule nisi, that so much of the indorsement of the record as related to the jury finding specially that the tenancy was from Michaelmas to Michaelmas, old style, should be expunged, on an affidavit stating that the second plea in bar was pleaded expressly to put in issue the holding from the 29th September. He also obtained a rule nisi for a new trial in the first action for misdirection.

*M. D. Hill* (with whom was *Gale*), now shewed cause against the first-mentioned rule, and contended that the Court could not give judgment for the defendant, as the

(*a*) As to the validity of a tender of one gross sum for two debts, see *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith*, 1 Peake's Cas. 88.

1840.



KNIGHT

v.

M'DOWALL.


misstatement in the avowry had induced the plaintiff to plead in bar as he had done. The Court then called on

*Balguy* and *Whitehurst* contra. The cases decided on this statute shew that the plaintiff would not have been prejudiced by the amendment. Section 23 of 3 & 4 *Will.* 4, c. 42, relates to amendments at *Nisi Prius*, and provides for two classes of variance. In the first, where the judge thinks that the variance is in some particular not material to the merits of the case, and by which the opposite party cannot have been prejudiced, he may order the amendment to be made forthwith, on such terms as he shall think reasonable. In the second kind, where the variance is also not material to the merits of the case, but is such that the opposite party may have been prejudiced thereby in the conduct of his action, the judge may order the same to be amended, upon payment of costs and withdrawal of the record. Then section 24 enacts that the judge, instead of amending, may direct the facts to be indorsed specially, and the Court above may then give judgment according to the justice of the case, and it is submitted that the variance in this case is within the first branch of those mentioned in section 23. Now the decision in *Whitwill v. Scheer* (a) shews that the variance here was not such as would prejudice the plaintiff in the conduct of his action, and therefore that there might either have been an amendment made at the time, or a special indorsement on the record. There the defendant went down to trial with the intention of contesting a particular allegation in the plaintiff's declaration, and yet the learned judge at *Nisi Prius* allowed an amendment to be made, and this Court held that he was right in so doing. So also in *Ward v. Pearson* (b), Lord Abinger C. B. allowed of an amendment, substituting an entirely different contract to that declared on.

(a) 8 A. &amp; E. 701; S.C. 3 N. &amp; P. 398.

(b) 5 M. &amp; W. 16.

LORD DENMAN C. J.—It is quite clear that the Court have no power to give judgment as prayed for in the rule, as it is impossible to say that the misstatement in the avowry has not prejudiced the plaintiff in the conduct of his case, when he actually pleaded his plea in bar to traverse the allegation.

1840.  
  
 KNIGHT  
 v.  
 M'DOWALL.

PATTESON J.—The cases cited are nothing to the purpose; for in both of them the amendments were made at *Nisi Prius*, where the judge has that power under section 23, and may order the amendment, whether the opposite party is prejudiced or not, on certain terms (a). But this Court has no such power under section 24.

WILLIAMS J. concurred.

Rule discharged.

*Balguy* and *Whitehurst* then shewed cause against the rule for a new trial. There was abundant evidence at the trial to prove the contract between the plaintiff and defendants, as laid in the avowry in the first action. To prove the tender, the plaintiff was obliged to shew that he tendered the exact sum due on the day laid in the avowry; then how can it be said that a holding on that day was not proved? [*Patteson* J. You cannot contend that, if the issue had been on *non tenuit* only, the mere proof of tender of rent in November would have proved that the holding was a Michaelmas holding; if then you seek to shew in this case that the tender proves more, it can only be by resorting to the other plea, which *Harington v. M'Morris* (b) shews you cannot do.] That case decides only that the admission made in one plea cannot be used to prove the issue joined on another. Here the plaintiff's case, in answer to a demand for rent, is, that he can prove a tender of

(a) See S. P. per *Patteson* J. in *S. C. 6 N. & M. 433.*  
*Guest v. Elwes*, 5 A. & E. 124, 126; (b) 5 Taunt. 228.

1840.

KNIGHT  
v.  
M'DOWALL.

the rent due at new Michaelmas. The issue joined on the plea of tender shews what the *fact* to be proved was; when that fact was proved, it was available for all the issues in the cause: and the fact was, that the tender was made of the rent due at Michaelmas (new style), as laid in the avowry. Besides, the plaintiff himself used the record in the other action, to shew that the amount tendered made up the total amount of rent claimed; how then can it be said after that, that there was not ample evidence that he did hold *modo et formâ*?

*M. D. Hill* and *Gale* contra were not called on by the Court.

LORD DENMAN C. J.—I am not prepared to say that a plea of tender may not sometimes be evidence of a holding from the day laid in the avowry, but I cannot say, on the whole of this record, that it is so here; for the two pleas taken together mean no more than if a witness had stated in the box, that the tenancy was not on the days stated by the other side, and that the rent, according to the actual tenancy, had been already tendered.

PATTERSON J.—I think it is impossible to avoid being governed by the rule in *Harington v. M' Morris* (a), for in order to shew that the tender was of rent due on September 20th, the assistance of the plea of tender must be called in, which that case shews cannot be. The pleadings here amount to this, that the plaintiff did not hold from new Michaelmas, and the fact of tender by itself only shews that so much rent was due on the day on which it was tendered, but it is not proof at all that the day on which it accrued due was old Michaelmas or new Michaelmas. I doubt, as at present advised, whether the allegation in a plea can be any evidence at all in the cause in which it is pleaded,

(a) 3 T. 208.

except as an admission. In other proceedings between the parties, perhaps it may sometimes be made available for certain purposes, but it is not necessary to discuss this point at present.

1840.  
KNIGHT  
v.  
M'DOWALL.

Rule absolute for a new trial.

*M. D. Hill* and *Gale* then contended that their rule to expunge the indorsement should also be made absolute, as the provisions of section 23 are incorporated in section 24, and the former section enables the Court "to make such order as to them may seem meet." This motion was necessary to bring the facts fully before the Court, in order to enable them to give judgment upon the materiality of the variance. Without it the Court could look at the indorsement alone, and would be uninformed whether the material question had been, what were the terms of the holding, or whether it was disputed that there had been any holding at all. If the latter had been the question, the former would probably be considered neither material to the merits of the cause nor prejudicial to the party in the conduct of his suit.

*Whitehurst* contra. The Court have no power to make an order except where the judge at *Nisi Prius* has made an amendment, which has not been done here.

Per CURIAM.—We have no power in this case to interfere with the special indorsement.

Rule for expunging the indorsement discharged.





1840.

*Saturday  
June 20th.*

ADAMS v. JONES.

To a declaration against the acceptor of a bill of exchange indorsed by the drawer to the plaintiff, the defendant pleaded that he accepted it on account of a debt due from him to the drawer, that the drawer indorsed it in blank and delivered it to the plaintiff as agent for *R.* for the purpose that the plaintiff should deliver it to *R.* in payment of a debt due from the drawer to *R.*; that the plaintiff gave no consideration for it and wrongfully retained it, in breach of his duty as *R.*'s agent, that *R.* claimed to be entitled and dissented from the plaintiff's suing:—  
Held, on motion for judgment non obstante veredicto, that the plea amounted to a constructive denial of the alleged indorsement to the plaintiff, and was therefore good after verdict.

**INDORSEE** against the acceptor of a bill of exchange. The declaration stated that one *Foulkes* drew the bill and directed it to the defendant and required him to pay to *Foulkes's* order 200*l.* for value received; that the defendant accepted the bill and that *Foulkes* indorsed it to the plaintiff, of which the defendant had notice &c.

Plea. That the bill was accepted by the defendant on account of 200*l.* due from him to *Foulkes* upon the sale of a tack-note of part of a mine, which tack-note had been before sold to *Foulkes* by one *Roberts*; that at the time the defendant accepted the bill *Foulkes* was indebted to *Roberts* in 900*l.* on account of that sale; that the defendant accepted and delivered the bill to *Foulkes*, and that *Foulkes* received it on account of the said sum of 200*l.* due from the defendant to *Foulkes* and on no other consideration; that *Foulkes* then indorsed the bill in blank and delivered the same to the plaintiff as the agent of *Roberts*, and for the purpose and on the terms that the plaintiff should deliver the same to *Roberts* on account of a part, to wit 200*l.*, of the monies due from *Foulkes* to *Roberts*; that the plaintiff took and received the bill, and held and still holds the same as the agent only of *Roberts*, and for the purpose and upon the terms aforesaid, without giving any value or consideration for the same; that the plaintiff did not nor would at any time deliver the bill to *Roberts*, but in breach and violation of his duty as agent and in fraud of *Roberts* kept and retained the bill to his the plaintiff's own use and benefit; that *Roberts* before the commencement of the suit claimed and still claims to be entitled to the bill and dissents from the plaintiff's suing and recovering in his the plaintiff's name, and hath required the defendant not to pay the same to the plaintiff.

After verdict for the plaintiff a rule nisi having been ob-

After verdict for the plaintiff a rule nisi having been ob-

tained to enter judgment for the plaintiff non obstante veredicto.

1840.

ADAMS

v.

JONES.

*Crompton* now shewed cause. The plea is good: it states facts which shew that the plaintiff has no title; that the bill was delivered to him as the servant of *Roberts*, that the plaintiff has embezzled it, and that, on this ground, *Roberts* prohibits the acceptor to pay the amount to the plaintiff. The case is as if a servant who under his master's directions had obtained a bill for a debt due to his master were to sue upon the bill on his own account. The indorsement to the plaintiff was made for his principal. The defence amounts to this, either that the plaintiff is not rightly the indorsee, (and the informality of the plea cannot now be objected to) or that the bill is fraudulently held by the plaintiff, so that the defendant, after notice, would not be justified in paying him. Payment is not to be made to the wrongful holder: *Chitty* on Bills, 428 (a) (citing 1 *Pardess*.) and *Paley's* Principal and Agent 276 (b). The plaintiff would have no defence to an action of trover by *Roberts* for the bill: *Treutell v. Barandon* (c). In that case the defendants had notice on the face of the bill, but any notice aliunde would have the same effect in making the holder's possession wrongful. Even in the case of a special indorsement to an agent, the principal might come in, and claim at any time; but in the present case of a blank indorsement, no title ever passed except to the principal. In *Machell v. Kinnear* (d), a bill of exchange was indorsed in blank to a banking firm, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors. It was held that two of the banking firm, who were also trustees of the insolvent's estate, could not, jointly with the third trustee, who was not a member of the firm, sue upon the bill without some evidence of the transfer of

(a) Eighth edition.

(c) 8 Taunt. 100.

(b) Third edition.

(d) 1 Stark. 499.

1840.

ADAMS  
v.  
JONES.

the bill to them as trustees by the firm, because it had passed to the firm by a particular transfer on a special account, and this circumstance defeated the title that would have been otherwise evidenced by the blank indorsement.

*Welsby* contra. The plea admits consideration to the defendant, and that *Foulkes* had authority to obtain the bill. The plaintiff may therefore recover as trustee for *Roberts*, and payment to the plaintiff would discharge the defendant from liability to *Roberts*. The case bears no resemblance to cases where an ordinary chattel has been stolen, or where the possession of a bill has originally been obtained by wrong. *Noel v. Rich* was referred to (a).

*Cur. adv. vult.*

LORD DENMAN C. J. on a subsequent day of these sittings (June 24th) delivered the judgment of the Court (b).

This was an action by the indorsee against the acceptor of a bill of exchange, the plea was as follows. [His Lordship then read the plea.]

The replication was *de injuriâ*. A verdict was found for the defendant. Afterwards a rule nisi was obtained to enter judgment for the plaintiff non obstante veredicto. The plea does not admit an indorsement from *Foulkes* to the plaintiff, and might possibly be bad on special demurrer for that reason. It states that *Foulkes*, the payee, indorsed the bill in blank, and delivered it to the plaintiff, as agent for one *Roberts*, for the purpose that the plaintiff should deliver it to *Roberts* in part payment of a debt due from *Foulkes* to *Roberts*, and that plaintiff gave no consideration for it. The declaration avers that *Foulkes* indorsed the bill to the plaintiff. Now a bill may be indorsed to a party in two ways, either by a special indorsement, making it payable to that

(a) 4 Dowl. P. C. 228.

(b) Lord Denman C.J., *Patterson, Williams and Coleridge* Js.

party, or by a blank indorsement and delivery to that party. In the latter way at all events, if not in the former, the bill must be delivered to the party as indorsee, in order to constitute an indorsement to him. But this plea avers that the bill was indorsed in blank and delivered to the plaintiff, not as indorsee, but as agent only for another, to whom he was to deliver it, and who was the real indorsee. We think therefore that it is a constructive denial that the bill was indorsed to the plaintiff, and that it is good in the present stage of proceedings, however open it may have been to a special demurrer. A judgment non obstante veredicto is always upon the merits, and never granted but in a very clear case, where it is apparent that in any way of putting the case the defendant can have no merits. Such is not the case here. The plea is substantially good and the rule must be discharged.

Rule discharged.

1840.  
ADAMS  
v.  
JONES.

DOR, on the several demises of ELIZABETH THOMSON  
and others, v. AMEY.

Monday,  
June 22nd.

**EJECTMENT** for a farm. At the trial before *Tindal* C. J. at the Cambridge summer assizes, 1838, it appeared that the lessors of the plaintiff were the executors and trustees under the will of *R. Thomson*, deceased, and that the action was brought to recover a farm. In the year 1835 the farm was in the occupation of a Mr. *Pym*, under a lease to expire at Michaelmas in that year, and in the July preceding *E. Thomson*, on the behalf of herself and the other executors and trustees, agreed with the defendant to let him the premises from the then next Michaelmas for a term of fourteen years, and an agreement, in substance as follows, was signed by the parties:—

When a party enters into possession of a farm and pays rent under an agreement for a lease containing divers covenants to cultivate, pay rent &c. he is bound by all the covenants in the agreement applicable to a tenancy from year to year:—Held, therefore, where the

agreement stipulated for the lease to contain a condition of re-entry if the tenant should grow two successive crops of white corn without fallow, that he might be ejected without notice, if he committed a breach of this covenant.

1840.

DOE

v.

AMEY.

“ Articles of Agreement entered into this 29th July, 1835, between *Elizabeth Thomson* of &c. one of the executors and devisees in trust, and also one of the residuary legatees named and appointed in and by the last will and testament of the Rev. *Robert Thomson* of &c., for and on behalf of the other executors, devisees in trust, and residuary legatees, named and appointed in and by the same will, of the one part, and *Samuel Amey* of &c. of the other part.

“ The said *Elizabeth Thomson*, in consideration of the rents, covenants, and agreements hereinafter mentioned, on the part of the said *Samuel Amey*, his executors and administrators, to be paid, performed, and observed respectively, doth hereby, so far as she lawfully can or may, promise and agree to and with the said *Samuel Amey*, his executors &c., that she the said *E. Thomson*, and all other necessary parties, shall and will grant and execute to the said *S. Amey*, his &c., a good and sufficient demise or lease of” &c. habendum for fourteen years from Michaelmas next, at the yearly rent of 346*l.*, “ and it is hereby covenanted and agreed that there shall be contained in the said lease,” (inter alia) “ all usual and proper covenants on the part of the said *Amey*, his executors &c., for using and managing the said lands and premises, hereby agreed to be demised, in a proper and husbandlike manner in all respects, according to the best system of husbandry practised in that part of the country, and, in particular, covenants that the said *Amey* shall” (inter alia) “ *not grow two successive crops of white corn or grain on any of the arable land without summer-tilthing, or taking a green fallow crop thereon.*” “ And in the said lease shall be contained a proviso empowering the said intended lessors, their heirs, &c. to enter upon the said premises as of their former estate, in case the said rents or either of them shall be in arrear for thirty days, or the said *Amey*, his executors &c. shall without consent assign &c. or fail in observing any of the covenants or agreements therein contained,” “ together with all such other reasonable cove-

nants, clauses &c. on the part of the said *Amey* as are usual and proper in leases of a like nature."

1840.

DOE  
v.  
AMEY.

No lease was ever executed, but the defendant entered into the farm at the period mentioned in the agreement, and continued to occupy it up to the time of the action, paying rent regularly up to Lady-day, 1837; after which the lessors of the plaintiff refused to receive it. They subsequently served him with a notice assigning several breaches of the covenants contained in the agreement, by virtue of which the premises were now sought to be recovered.

The principal breach relied on and proved by the plaintiff at the trial was, that the defendant had grown two successive crops of white corn or grain upon part of the land, without summer-tilthing or taking a green fallow crop thereon.

It was objected for the defendant that this breach could not be relied on as a forfeiture, for that the above instrument amounted only to an agreement for a lease, and therefore, although the defendant had made himself tenant from year to year by occupying and paying rent, he was not bound by the covenants applicable to a term for years, and was entitled to a notice to quit before he could be ejected. The Chief Justice reserved the point and the verdict passed for the plaintiff.

A rule having been obtained accordingly to enter a nonsuit,

*Kelly* (with whom was *Byles*) now shewed cause, and contended that it was unimportant to consider whether the instrument amounted to a lease, or to an agreement only, for that, if it was the latter, still, as the defendant held under it, he was bound by the covenants and conditions contained therein : *Doe v. Breach* (a).

*B. Andrews* and *Gunning* contra. If this instrument is

(a) 6 Esp. 106; and see *Doe v. Stratton*, 4 Bing. 446; and *Knight v. Bennett*, 3 Bing. 361.

1840.

DOE  
v.  
AMEY.

only an agreement for a lease, the tenancy from year to year does not arise out of it, so as to incorporate all the conditions it contains. When possession is taken under an agreement of this kind, and rent is actually paid, then it is true a tenancy is created and distress may be made, but not before; it is, therefore, the payment of rent only, and not the agreement, that creates a tenancy, and that by operation of law. It is quite clear that this agreement does not vest the term of fourteen years in the defendant; how then can the breach of any condition in the instrument divest an estate created aliunde? The lessors of the plaintiff are not estopped from declaring that no estate passed, the defendant therefore cannot be estopped from denying that he is bound by the condition. [*Patteson J.* Do you contend that if a party took possession under an agreement of this kind, containing covenants as to good husbandry, he might cultivate the land as he pleased?] Probably not, and he might be liable in damages, but the question is whether a forfeiture is created. It is submitted that all these covenants as to a rotation of crops &c. which are only introduced with reference to a term for years, cannot apply to a yearly tenancy. When that tenancy arises between parties, it cannot be presumed that they would enter into contracts upon matters which do not present themselves during so short a term; and, as it is only by implication that any portion of the agreement can be made referable to a term of years, no more should be implied than what it must be presumed the parties would have actually stipulated for, if they had entered into an express contract. So again with respect to repairs, a tenant entering into a long lease might well stipulate to do substantial repairs, but a tenant from year to year is not bound to more than tenantable repair. *Morgan v. Bissell* (a) shews that the nature of instruments of this kind is to be determined by observing whether the covenants in them are applicable to a lease or not, but that test falls to the ground, if the covenants are

(a) 3 Taunt. 65.

equally binding whether in an agreement or lease. *Bicknell v. Hood* (a) is the latest case on the subject, and is to some extent an authority for the defendant.

1840.  
  
 Doe  
 v.  
 AMEY.

LORD DENMAN C. J.—This is an agreement to demise for a term of fourteen years, and the defendant entered into possession no doubt with the expectation of a lease being executed. But in such case the lessee holds, subject to the covenants and conditions contained in the agreement, so far as they can be made applicable to a tenancy from year to year. This has been the language of Westminster Hall as long as I remember, and expresses the opinion which every one has entertained. If then one of the conditions as to husbandry has been broken, the consequence must follow that a forfeiture has been incurred. It may be that different kinds of tenancy impose different obligations with respect to repairs and other matters, but, if a party chooses to enter into possession and occupy under an agreement containing specific covenants, he is as much bound by them as by any other contract which he voluntarily makes.

PATTESON J.—I think no doubt can be raised on the question. In *Mann v. Lovejoy* (b), where the occupier under an agreement had paid rent, Lord Tenterden C. J. held distinctly at Nisi Prius that the occupation under the agreement constituted a tenancy from year to year on the terms of the agreement, and his decision was confirmed by the full Court. The same point has been constantly ruled with respect to a party holding over after his lease has expired. It does not appear to be denied here that the defendant would be liable for bad husbandry during his occupation, but a distinction is sought to be drawn as to his liability to be ejected on that ground. I cannot perceive why. It is said that the tenancy from year to year arises by operation of law out of the payment of rent, but this is a fallacy; no doubt rent must usually be paid under an agreement for a lease, before a distress can be made, but

(a) 5 M. & W. 104.

(b) Ry. & Moo. 355.



1840.

DOE

v.

AMEY.

when a party enters under an agreement he immediately becomes tenant according to all such conditions in the instrument as are applicable to a holding from year to year. The question then simply is, whether a condition to re-enter for a breach in cultivation that has occurred in two successive years, is applicable to such a tenancy. Why it should not be I cannot conceive. It is said that such a clause only applies to leases for years; but in some counties farmers never have leases, and yet it must be as important to bind them, as tenants under long leases, by covenants for good husbandry. Besides, the same argument might be urged by the tenant of a long lease, if a breach occurred in the first year of his tenancy. I think, therefore, where the clause is capable of application to a tenancy from year to year, (as it is here where the term has lasted for two or three years,) it is just as binding as in the case of a long lease.

WILLIAMS J.—This question has often arisen on considering the liability of parties holding over on the expiration of their lease, and it has always been held that the covenants in the lease were still binding upon them, so far as they were applicable to the occupation of the land. I cannot make any possible distinction between these cases and an occupation under an agreement.

Rule discharged.

Monday,  
June 22d.

RIX v. BORTON, Clerk, and another.

Justices sued  
for acting in  
execution of  
their office are


**TRESPASS** for assault and false imprisonment. Plea: not guilty (by statute).

entitled to the following protection by 24 *Geo. 2*, c. 44 and 21 *Jac. 1*, c. 12. 1. A month's notice of action, stating the cause of action. 2. Limitation of action to six months: and 3. Double costs, if the action fails. Justices and others acting under the Highway Act, 5 & 6 *Will. 4*, c. 50, s. 109, are entitled to—1. *Twenty-one days' notice* of action. 2. Limitation of action to three months. 3. Costs as between attorney and client. Held, that this clause, giving twenty-one days' notice of action, did not repeal the clause in the previous statute, entitling justices to one month's notice.

At the trial before *Tindal* C. J., it appeared that the action was brought against the defendants, who were magistrates, to recover damages for an illegal conviction under the Highway Act (5 & 6 Will. 4, c. 50, s. 75). On the 30th May, 1838, the plaintiff was convicted in the penalty of 1*l.* 1*s.* and 10*s.* costs, under section 75 of the act for rescuing cattle found straying on the high road, and on refusing to pay was committed to prison for one month with hard labour. Notice of action was given on the 26th July following, and the writ was issued within the three months required by the act, viz. on the 23d August, 1838. It was objected for the defendants, that they were entitled to a calendar month's notice of action, under 24 Geo. 2, c. 24, s. 1. The plaintiff contended that, as section 109 of the Highway Act required only twenty-one days' notice of action, the section in the previous statute was repealed by implication, the Chief Justice reserved the point, and the verdict passed for the plaintiff, damages 40*s.*

*B. Andrews* having obtained a rule nisi for a nonsuit on the point reserved, in the ensuing Easter term,

*Palmer* now shewed cause. The principle is quite clear, that where there are two acts *in pari materia*, if there is any clause in the latter act inconsistent with the provision of the former act, it repeals it by implication (*a*). Thus by a local act, commissioners for lighting were authorized to sue for rates, *if there was no sufficient distress*. A subsequent act enabled commissioners and others to sue for rates without imposing any condition as to sufficient distress, and it was held that the latter statute repealed the clause in the former statute as to the distress; *Rex v. Halls* (*b*). [Lord Denman C. J. If any provision in the latter act is contrary to one in the former, no doubt it repeals it, but that is the question here.] The 24 Geo. 2, c. 44, s. 1, gives to magis-

1840.  
  
*Rix*  
*v.*  
*Borton.*

(*a*) See *Ex parte Caruthers*, 9 East, 47, and the note of the re-  
 porter, referring to *Harcourt v. Fox*, 1 Show. 520.

(*b*) 3 A. & E. 494.

1840.

  
 RIX  
 v.  
 BORTON.

trates generally the following protection: 1. one calendar month's notice of an action is to be given, stating the cause of action and the name of the attorney; 2. the action must be commenced within six months; and 3. magistrates are entitled to double costs if they succeed. The Highway Act, section 109, gives magistrates acting under that statute an entirely different protection: 1. twenty-one days' notice of action, without mention of the cause of action; 2. the action must be brought within three months; and 3. costs as between attorney and client only. Under this act, the magistrate is much benefited by limiting the action, it is clear therefore that the clause in the former act, as to six months' limitation, is repealed, but the rights of the public to sue are also consulted, and only twenty-one days' notice of action is required. It follows therefore, on sound construction, that the whole clause in the latter act is a substitution for that in the former, so far as convictions, &c. under the Highway Act are concerned. *Bazing v. Skelton* (a) seems an express decision in point, for there it was held that a protection given by one act to parties sued *under* that act, did not extend to actions brought against the same parties for acts under a subsequent act. So here, the 24 Geo. 2, c. 44, protects justices in the execution of their office generally, but by the Highway Act a special and different protection is introduced for all acts done by virtue of that statute, and therefore the above decision shews that the protection in the former statute is not incorporated in it.

*B. Andrews* and *Byles* contra were not called upon.

LORD DENMAN C. J.—There is certainly nothing expressed in the Highway Act, 5 & 6 Will. 4, c. 50, to shew that the protecting clause to justices is a substitution for that in the 24 Geo. 2, c. 44, and I do not think there is any thing implied which points out that to be the construction of it. It is true that the former statute limits the action to

(a) 5 T. R. 16.

six months after the act complained of, and the present one to three only, and therefore so far there is a repugnancy, but I see no necessary inconsistency in one statute requiring that a month's notice of action should be given and in a later act requiring twenty-one days' notice. Both therefore may stand together, especially as the notice in the Highway Act applies to other parties as well as justices, and therefore, as there is no repeal of the clause requiring a month's notice, the defendants are entitled to rely on the objection.

1840.

*Rix*  
*v.*  
*BORTON.*

PATTERSON J.—Under the 24 Geo. 2, c. 44, the notice is required to be given one month before the suing out the writ, and, as the action is to be within six months, there would be five months' interval between the notice and the action, whereas under the Highway Act, there would be only two months. But I do not see that this makes any difference as to the month's notice to be given to justices, and therefore the clause as to that is not contradictory of the former statute, and does not repeal it.

WILLIAMS J. concurred.

Rule absolute.

The QUEEN *v.* KELK.

Wednesday,  
June 24th.

THIS was a mandamus calling on the defendant to swear in one *Clarke* a commissioner for draining certain lands hereinafter mentioned, to which writ the defendant returned that *Clarke* was not duly elected: this allegation was traversed, and issue was joined thereon. The case was tried at Nottingham at the spring assizes, before *Bosanquet J.*, when a verdict was returned for the crown, subject to the opinion of the Court on the following case:—

A local drainage act directed that the commissioners should be elected by the proprietors of the lands within the parish:—*Quere*, whether, by the term "proprietors" was meant those who had the

By an act passed in the 36th Geo. 3, intituled "An Act

actual control of the lands, or the strict owners in fee.

2. Where under a local act a proxy to vote may be appointed by writing, the writing must be stamped.

1840.

The QUEEN  
v.  
KELK.

for more effectually embanking, draining, preserving, and improving certain low lands and grounds lying and being at Everton, Scalptworth, Gringley on the Hill, Misterton, and Walkeringham, in the county of Nottingham," *W. Gauntley, J. Dowland* and *W. Whitelock* were appointed commissioners for putting the act into execution. And it was enacted that upon the death, refusal, or incapacity to act, of *W. Gauntley*, or of any succeeding commissioner, to be appointed by the proprietors of the lands within the parishes of Everton, &c. intended to be embanked and drained by virtue of that act, it should be lawful for the said proprietors, or the major part of them in value, from time to time, at any meeting to be held for that purpose, within such time and with such formalities as are mentioned in the act, to elect one other commissioner in the room of such commissioner who should so die, &c. It was further enacted that it should be lawful for the trustees for the time being of the estate of *Thomas Magnus*, deceased, lying and being in the parish of Everton, to apply any parts of the rents and profits arising from such estates in or towards the defraying or paying the rates or taxes to be charged or assessed upon the lands and grounds belonging to the said trustees by virtue of the said act. By another act, passed in the 41st Geo. 3, for altering and amending the said last mentioned act, it was enacted that, in the place of the said commissioners under the former act, three special commissioners should be nominated and appointed by the respective proprietors of lands and grounds in the several townships or parishes of Everton, Scalptworth, Gringley on the Hill, Misterton, and Walkeringham, aforesaid. And it was further enacted that it should be lawful for the known agent or agents for the time being of each and every proprietor entitled to vote in the election of any original or special commissioner, or for any other person or persons authorized and empowered by any note in writing, signed by such proprietor or proprietors, to act in the nomination and appointment of such commissioner as fully and effec-

tually as if such proprietor or proprietors in whose behalf he or they shall or may act, was or were present at any meeting or meetings to be holden for that purpose.

1840.  
  
 The QUEEN  
 v.  
 KELK.

*Francis Raynes* had been heretofore duly nominated and appointed a special commissioner under the authority of the said acts within the last five years, by the proprietors of lands and grounds within the townships of Everton and Scalptworth, and shortly previous to the 9th May last became incapable of acting, and it became necessary to elect another special commissioner in his place accordingly. On 9th May last a meeting was held at Everton under the provisions of the before mentioned act, for the purpose of electing such other special commissioner in the place of *Raynes*. The meeting was duly held; and all the requisites and provisions in the recited acts contained for convening such meeting for electing such commissioner having been complied with, the proprietors of the lands and grounds in Everton and Scalptworth at such meeting duly proceeded to elect a special commissioner for those townships in the room of *F. Raynes*, and the proceedings there were legally conducted. There were two candidates duly nominated for the appointment, the said *Clarke* and *R. Weighman*; and, if a vote given for *Clarke* by Mr. *T. F. A. Burnaby*, on behalf of the trustees of the *Magnus* estate, under the circumstances hereinafter stated, was a good vote, then *Clarke* was duly nominated and appointed by the proprietors of the lands and grounds in the townships of Everton and Scalptworth in the place of *Raynes*, as in the said writ alleged, but, if not a good vote, then *Clarke* was not so duly elected and appointed.

A decree of the Court of Chancery in 1738 was then set out, by which it appeared that the corporation of Newark had been in the habit of appropriating to their own use the rents and profits of the *Magnus* estate, and, on application to the Lord Chancellor, his lordship decreed that for the future a receiver should be appointed by the vicar, mayor,

1840.

The QUEEN  
v.  
KELK.

senior alderman, and churchwardens, or the major part of them; that the churchwardens should, with the privity of the above, make all the payments mentioned in the decree; and that the surplus rents should be applied by the mayor, vicar, senior alderman, and four churchwardens, in repairing the church of Newark, or other good works for the common weal of the town. Several deeds and leases were also set out, by which it appeared that the mayor and aldermen were treated up to 5 & 6 *Will.* 4, c. 76, as the owners in fee of the *Magnus* estate. Ever since the decree of 1738 the mayor, vicar, senior alderman, and four churchwardens, have appointed the receiver.

In pursuance of the 71st sect. of the Municipal Reform Act, 5 & 6 *Will.* 4, c. 76, a petition was presented to the Lord Chancellor, in 1836, to appoint trustees to the Newark charities; and on the 17th December in that year his lordship appointed a list of twenty-one persons to be trustees of Newark charities, expressly naming amongst others that of *Magnus*. The corporation of Newark, on the 1st January, 1836, and every succeeding 1st January, have appointed out of their body, according to and under the 73rd sect. of the Municipal Reform Act, certain number of persons to be trustees of *Magnus* charity jointly with the vicar and four churchwardens. On 1st January, 1838, they appointed Mr. *Carparu* to be a trustee in the place of the mayor, Mr. *Godfrey* in the place of the senior alderman, and thirteen persons in the place of the mayor and aldermen; and the receiver appointed by the parties so elected by the council in the place of the mayor and senior alderman, under the aforesaid decree, has always received the rents; and the parties elected in the place of the mayor and senior alderman, jointly with the vicar and four churchwardens, have applied them and managed the whole business of the charity, exactly in the same way as the mayor, vicar, senior alderman, and four churchwardens, were in the habit of doing before the passing of the Municipal Reform Act.

Previously to the said meeting at Everton on the 9th May last, for electing a special commissioner, the mayor, senior alderman, vicar, and four churchwardens, as trustees of *Magnus* estate, being duly convened, met at the town hall in Newark, at which meeting were present the then mayor, vicar and three churchwardens of Newark, and it was at such meeting resolved that *Clarke* was most eligible, and it was resolved that *Burnaby*, the town clerk, should be authorized to attend on the day of election, and to record his vote on behalf of the trustees in favour of the plaintiff. A note in writing or proxy, and which is hereinafter set forth, authorized Mr. *Burnaby* to act, in the nomination and appointment of such commissioner, for the said trustees, which note in writing was then signed accordingly by the mayor, vicar and three churchwardens, being the major part of the trustees so convened. Previous to the said meeting on the 9th May, Mr. *Burnaby* also obtained (though no meeting was called of the thirteen trustees) a note in writing, signed and executed by seven of the thirteen persons so appointed by the town council, under the 73rd sect. of the Municipal Reform Act, in the place of the mayor and aldermen, to act in the nomination and appointment of such commissioner, for such major part.

1840.  
  
 The QUEEN  
 v.  
 KELK.

The following is a copy of the first mentioned proxy:—

“We the undersigned, being the major part of the trustees of the estate of *Thomas Magnus*, deceased, lying and being, &c. do by this note in writing under our hands, in pursuance of the statute in this behalf made and provided, authorize and empower *Thomas Fowke*, *Andrew Burnaby*, *John Bass Oliver*, and *Joseph Phipps Townsend*, of K., or any one of them, to act for us in a nomination and appointment of a special commissioner,” &c. &c.

The other proxy was in the same form. Under these authorities *Burnaby* attended the meeting at Everton, and voted for *Clarke*.

The proxies were not stamped, and were on that account objected to at the trial.

The question for the opinion of the Court is, whether,



1840.

The QUEEN  
v.  
KELK.

under the circumstances, it is proved that a good vote was given for *Clarke* by Mr. *Burnaby* in respect of the above estate.

The case was argued on a former day (*a*) in this term by

*Whitehurst* for the crown, who contended, first, that the words "proprietors of lands," in the 36 Geo. 3, meant those who had the control over the estate, not the mere legal owners of the lands; that, up to the passing of the 5 & 6 Will. 4, c. 76, the vicar, senior alderman, and churchwardens were the proprietors; and that since that act the members of the council chosen under section 73, with the vicar and churchwardens, were the proprietors, and therefore that the proxy given by them to Mr. *Burnaby* was good. 2dly. It is contended, however, that the proxy could not be given in evidence without being stamped, but the only head in the stamp act to which a proxy can be referred is, *letter of attorney*, and that, it is submitted, only includes letters or powers of attorney properly so called. The only case decided upon the subject is *Case v. Barnard* (*b*), decided at Guildhall by Lord *Tenterden*, who held that a paper authorizing *A.* to sell certain property, and thereout pay rent and expenses, signed by *B.*, did not require any stamp. The power given there was much larger than in the present case, for Mr. *Burnaby* was required to do a single act and had no discretion whatever given him. The present point was raised in *Monmouthshire Canal v. Kendall* (*c*), but no opinion was given; and it seems clear that the stamp act never could have been intended to apply to a case of this kind, for otherwise no railway or vestry act could be carried into execution.

*Waddington* contra, on the first point contended, that the corporation were the proprietors of the Magnus estate

(*a*) June 3d, before Lord *Denman* C.J., *Littledale*, *Patteson* and *Williams* Js.

(*b*) 2 Chitt. St. 995.

(*c*) 4 B. & Ald. 458.

up to the passing of the Municipal Corporation Act, and since that statute the fee had either vested in the trustees appointed by the Lord Chancellor, or in the heir of the grantor (a). 2dly. *The Monmouthshire Canal Company v. Kendall* (b) shews that it has long been a doubtful question whether a proxy should not have a stamp. "Letter of attorney" is not the only head under which a proxy would fall; "procuracion" comprehends it entirely, the word proxy being equivalent to procuracy, as is shewn by *Campbell arguendo* in that case. The meaning of procurator is given by *Cicero*, in his oration *pro Cæcinâ*, "omnes sint aut appellentur procuratores qui negotii nostri aliquid gerant;" and, in the dictionaries, "alieno negotio præpositus," "alieni juris vicarius,"—and it is clear that the appointment of Mr. *Burnaby* brings him within the above definitions. He is authorized to vote for a commissioner, and the terms of the instrument in no way fetter his discretion as to whom his vote shall be given. It will be seen also that the instrument is strictly a letter of attorney, for the appointment of *Clarke* to be a commissioner purports to be signed by the proprietor or duly authorized *attornies* of proprietors,

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—Two questions arise in this case. First, what construction ought to be put upon the words "proprietors of lands and grounds," in the two acts of parliament referred to in the case. If these words necessarily mean "the persons who have the legal estate in the lands and grounds," the vote given by Mr. *Burnaby* for Mr. *Clarke* is clearly bad. The legal estate appears beyond any reasonable doubt to have been in the corporation of Newark at the time of the passing the statute 5 & 6 Will. 4, c. 76, and in them solely, but they held it as trustees. Their estate

(a) On this point he cited *Re 239; Phillipott's Charity*, 8 Sim. 381.  
*Oxford Charities*, 3 Myl. & Cr.

(b) 4 B. & Ald. 453.

1840.

The QUEEN  
v.  
KELK.

ceased on the 1st of August, 1836, by virtue of the 71st section of the act, and, as trustees were appointed by the Lord Chancellor under that section, the legal estate, if not in abeyance altogether, would be in them; but Mr. *Burnaby* had no authority to vote either from the corporation or those trustees. If, however, the words "proprietors of lands and grounds" can be construed in a popular sense to mean "those who have the control over and management of the lands and grounds, and receive and dispose of the rents and profits, and are assessed and charged under the act," then the mayor, vicar, senior alderman and churchwardens, or the trustees appointed by the town council under the 73d section of the Municipal Corporation Act, are the proprietors, and Mr. *Burnaby* had authority to vote from both those bodies, and his vote would be good. The second question is, whether the authority under which Mr. *Burnaby* acted required a stamp. The act 41 Geo. 3 empowers an agent, authorized by the proprietor by a note in writing signed by him, to vote. The stamp act requires that all letters of attorney, and every deed or other instrument of procuration, should be stamped. This question was raised in the case of *The Monmouthshire Canal Company v. Kendall* (a), but was not determined, the Court holding that the parties were not at liberty to dispute it under the circumstances. In the present case the party is clearly entitled to take the objection. It was argued that no stamp was necessary, because the authority gave no discretion to Mr. *Burnaby* in voting, but this argument, supposing it to have any weight, is not founded in fact, for on referring to the instrument we find no restriction, nor does it state for whom Mr. *Burnaby* was to vote; it simply authorizes him to act for the persons signing it in the nomination and appointment of a commissioner. He might have voted for any candidate he chose. As, therefore, Mr. *Burnaby* was by the instrument substituted for the proprietors signing, and was appointed to act for them, we do

not see how it is possible to deny that the writing by which he was so appointed, is either a letter of attorney or an instrument of procuration; and, however unwilling to yield to an objection of the sort, we feel ourselves bound to hold that the authority was bad, and the vote bad. Consequently it is unnecessary for us to express an opinion upon the first point, and the verdict must be entered for the defendants.

Verdict for defendants.

1840.

The QUEEN  
v.  
KELK.

DOE on the demise of ELIZABETH THOMAS v. ANN  
BEYNON.

Wednesday,  
June 24th.

**EJECTMENT** for messuages &c. in the parish of Llanover, &c. At the trial at the Monmouthshire spring assizes, 1839, before *Erskine J.*, the lessor of the plaintiff claimed one-third of a farm at Llannover, under the following devise in the will of *William Lewis*, dated 20th June, 1801:

“ I give and devise all my messuage, farm, lands, &c. unto my niece *Mary Beynon*, of the city of Bristol, widow, for and during the term of her natural life, and from and after her decease unto her three daughters, *Mary, Elizabeth and Ann*, to take in equal parts and shares as tenants in common, and not as joint-tenants, and to their heirs and assigns for ever.” It appeared by admissions that *Mary Beynon*, the tenant for life, had intermarried with *Wm. Beynon* in 1785, and had three daughters by him, viz. *Mary, Ann* (the defendant) and *Elizabeth*. *Mary Beynon* (the daughter) died in November, 1831, and *Elizabeth Beynon* in August, 1795, aged six weeks. *William Beynon* died 7th

1. On a devise to *M. B.*, widow, for life, and her three daughters, *Mary, Elizabeth and Ann*, in fee, an illegitimate daughter, named *Elizabeth*, claimed as being the only *Elizabeth* answering the description at the time of the will being made, a legitimate daughter *Elizabeth* having been dead six years previously:—Held, that parol evidence was admissible to shew

that the testator intended his legitimate daughter as devisee, and that he did not know of her death.

2. Letters more than thirty years' old, produced from the proper custody, prove themselves.

3. The defendant produced letters thirty years' old, purporting to be addressed to her mother, and proved that she was living with her mother at the time of her death, when her papers and keys were given up to her:—Held, that the custody was proper.

1840.

DOE  
d.  
THOMAS  
v.  
BEYNON.

October, 1797. The lessor of the plaintiff was an illegitimate daughter of *Mary Beynon*, having been born on the 28th August, 1798, and was christened by the name of *Elizabeth Thomas*, daughter of *Thomas Thomas* and *Mary Thomas*, late *Mary Beynon*. *T. Thomas* and *Mary Beynon*, the widow, intermarried on the 25th March, 1799. Under these circumstances the lessor of the plaintiff claimed as the "*Elizabeth*, daughter of *Mary Beynon*," mentioned in the will. The defendant contended that, under the term daughters, *primâ facie* only the legitimate daughters of *Mary Beynon* could take, and proposed to prove that *Mary Beynon* had concealed from the testator the birth of the lessor of the plaintiff, and her subsequent marriage with *Thomas*, and that he was ignorant of it and of the death of her legitimate daughter *Elizabeth*. This evidence was objected to on the ground that, as the lessor of the plaintiff was the only *Elizabeth*, daughter of *Mary Beynon*, at the time of the making of the will, the other *Elizabeth* having been dead six years, there was no ambiguity, and parol evidence was inadmissible. The learned judge received the evidence on the ground that, under the description of "daughters," *primâ facie* legitimate daughters only were meant, and that, if there was any evidence that the lessor of the plaintiff, as an illegitimate daughter, was intended, it was competent to the defendant to give evidence to rebut that presumption. *Thomas*, the second husband of *Mary Beynon*, was then called, and some letters, above thirty years old, purporting to come from the testator to *Mary Beynon*, his wife, were put into his hands. He recollected these letters being given to his wife from time to time by one *Coombes*, a carrier, who travelled between Bristol, where they lived, and Pennypond, where the testator lived. They contained money &c., and proved the facts set up in the defence. These letters were produced from the custody of the defendant, who lived with her mother, *Mary Thomas*, up to the time of the death of the latter, all of whose papers, keys, &c. were then given up to defendant. The

reception of these letters was objected to, on the ground of the handwriting of the testator not having been proved, and of the custody from which they were produced being improper. The learned judge admitted them, and left it to the jury whether the testator intended his legitimate daughter, or the lessor of the plaintiff, by the description of "*Elizabeth*;" the jury found the former, and the verdict passed for the defendant.

*R. V. Richards* having obtained a rule nisi for a new trial, on the ground of the improper reception of evidence,

*Talfourd* Serjt. now shewed cause (*a*). 1. The question on this devise is, who was the *Elizabeth* intended by the testator, and the jury have disposed of it by finding that it was not the lessor of the plaintiff. Under the term "daughter," the lessor of the plaintiff, as an illegitimate child, would not take, unless there were strong extrinsic evidence to shew that it was so intended by the plaintiff (*b*). It lay therefore upon the plaintiff to supply that evidence. But the evidence completely shewed that it was the legitimate daughter that the testator intended. 2. The letters being thirty years old, and produced from the proper custody proved themselves, the rule of law extending to letters as well as to deeds or wills; *Wynne v. Tyrwhitt* (*c*); and the point was expressly so ruled on the two trials of *Beer v. Ward* (*d*).

*R. V. Richards* and *Carrington* contra. 1. No evidence at all was admissible to explain the will. There never was any ambiguity in its terms, so as to call for any evidence of the testator's intention. The lessor of the plaintiff was the only *Elizabeth* "daughter of *Mary Beynon*," both at the time of the making of the will and at the time of the testator's decease. *Elizabeth*, the legitimate daughter, died six years before the making of the will, and there is no instance

1840.


DoE  
d.  
THOMAS  
v.  
BEYNON.

(a) On a former day in this term.

(c) 4 B. & Ald. 376.

(b) See Wigram on Evidence in Aid of Wills, p. 29 (2d ed.).

(d) Phill. Ev. 652, n. (4), 8th ed.

1840.  
  
 DOE  
*d.*  
 THOMAS  
*v.*  
 BEYNON.

where there has been applied to a will extrinsic evidence of a state of facts so long prior to its being made. If there had been two *Elizabeths* at the time of the making the will, then evidence of intention might have been supplied, according to the case mentioned in *Cheyney's* case (*a*); but as the lessor of the plaintiff, and no one else, answered the description in the will, all other evidence was inadmissible. It is true that "*daughters*" or "*children*," where descriptive of a class, would exclude illegitimate children, as was held in *Wilkinson v. Adam* (*b*) and *Swaine v. Kennerley* (*c*); but where the term is used as descriptive of persons, illegitimate children may take under it jointly with legitimate; *Gill v. Shelley* (*d*). 2. The question as to the admissibility of the letters is of great general importance, and has never been solemnly decided; *Beer v. Ward* (*e*) was a nisi prius decision. *Wynne v. Tyrwhitt* (*f*) decided only that entries in a steward's books, thirty years old, and coming from the proper custody, proved themselves. But that case and the cases of ancient deeds and wills are wholly distinguishable from the present. Where property exists, it is reasonable to suppose that ancient documents tracing down the title to that property, and found in the hands of the owners of it, are authentic, and it is expedient to dispense with the formal proof that more recent documents would require. Yet even if such deeds are produced from a custody not connected in interest with the property, such for instance as the British Museum or Bodleian Library (*g*), they are inadmissible. But, if ancient letters are to be admitted, what test can there be of proper custody? A defendant produces a letter thirty years old, addressed to himself, and decisive on the point in issue: what corroboration can it be of its authenticity that it is produced by the party to whom it purports to be ad-

(*a*) 5 Rep. 68.

(*b*) 1 Ves. & B. 422.

(*c*) 1 Ves. & B. 469.


(*d*) Wigram on Evidence, 31,  
 (2d ed.)

(*e*) Phill. Ev. 652, n. (4), 8th ed

(*f*) 4 B. & Ald. 376.

(*g*) *Michell v. Rabbits*, cited in  
*Swinerton v. Marquis of Stafford*  
 3 Taunt. 91.

dressed. In the case of ancient writings, comparison of handwriting is required to authenticate the document, and it would seem that in the case of letters there is a still stronger necessity for some proof of the handwriting of the party. No evidence at all was produced of the testator having given the letters to the carrier.

1840.  
  
 DOE  
*d.*  
 THOMAS  
*v.*  
 BEYNON.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—In this case two questions on points of evidence arose, both of sufficient importance to require much consideration. Landed property was devised by will, dated in 1801, to *Mary Beynon* for life, remainder to her three daughters, *Mary, Elizabeth* and *Ann*, in fee. The lessor of the plaintiff claimed to be *Elizabeth*. *Mary Beynon* had had three legitimate daughters born in the order, and named, as stated in the will. *Elizabeth* only lived six months, and had been dead between five and six years at the date of the will. *Mary* and *Ann* were then living. *Mary Beynon* became a widow in 1797. Afterwards and before the date of the will she had an illegitimate daughter, whom she named *Elizabeth*, and who is the lessor of the plaintiff. The learned judge held that the words of the will *primâ facie* imported legitimate children, and that, although the illegitimate daughter might be included, yet it lay on the lessor of the plaintiff to shew that the testator so intended. Evidence was gone into, and the jury were fully satisfied that the testator intended *Elizabeth*, the legitimate daughter, whom he did not know to be dead, and not the lessor of the plaintiff, of whose existence he was ignorant, and whose birth had been studiously concealed from him. On the argument in support of a rule for a new trial, the reception of this evidence was objected to on the ground that, as a person existed at the time of the making of the will who fully answered the description in the devise, there was no ambiguity, and of course no evidence could be admissible to remove any, still more as that person was



1840.

DOE  
d.  
THOMAS  
v.  
BEYNON.

the only one who did answer the description. And it was further urged that, although another person formerly existed who, if living, would also have answered even more fully the description in the devise, yet that the death of that person conclusively prevented the application of the words of the devise to her. But that death is in truth a mere accident, and can have no other effect in determining the sole point in issue—the meaning attached by the testator to his own language—than by shewing the improbability of the intention supposed. Under these circumstances, we think that the learned judge was right in requiring some proof that the testator intended to include the illegitimate daughter *Elizabeth* in the devise in question, and that, in order to establish or to rebut that proposition, all the circumstances of the family, the intercourse which the testator had with Mrs. *Beynon* and her children, and his knowledge of their number and names, were properly laid before the jury, and that it was the duty of the jury to interpret the devise with reference to all such evidence. No declarations of the testator were in this case offered in evidence, and therefore the distinctions taken in some recent cases on that head need not be examined. Another objection was taken on the argument, viz. the reception of letters thirty years old, purporting to be written by the testator to Mrs. *Beynon*, without proof of his writing. In fact there was evidence to shew that those identical papers had been sent by the testator by a carrier, about the time of their date, to Mrs. *Beynon*. We do not think it necessary that it should be so proved, but in conformity with what was done at *Nisi Prius* by Lord *Dallas* C. J. in the case of *Beer v. Ward* (a), we think that they were properly admitted. Some questions were attempted to be raised as to their coming from the proper custody, but the objection on that ground entirely failed. There is therefore no reason for a new trial, and the rule must be discharged.

Rule discharged (b).

(a) *Phill. Ev.* 652, n. (4), 8th ed. (b) See *Doe d. Allen v. Allen*, *post*.

1840.

## WHYTE v. ROSE.

Wednesday,  
June 24th.

DEBT on an annuity deed by the plaintiff, as administrator of *Ellen Davy*, the annuitant. The plea set out on oyer the letters of administration granted by the Archbishop of Canterbury, of the date of 16th January, 1838, in which the intestate was described as *Ellen Davy*, formerly *Loner-gan*, spinster, late of Halifax, in Nova Scotia, deceased, and averred that before and at the time of the death of the said *Ellen*, to wit, on the 6th October, 1835, the indenture in the declaration mentioned was without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland, and was not then, at the time of the death of the said *Ellen*, to be administered within the diocese of Canterbury, but on the contrary thereof, was then of the notable goods of the said *Ellen* to be administered within the kingdom of Ireland.

Special demurrer, setting out for cause, that it is not alleged or shewn in the said plea that the said indenture was, at the time of the death of the said *Ellen*, bona notabilia or assets within any province or diocese of England, or that the said *Ellen* had at the time of her death within this realm any other assets or goods whatsoever; but, on the contrary, the plea shews the said *Ellen* and the said indenture to have been beyond seas at the time of her death, and does not in any manner invalidate the grant of the administration to the plaintiff, or plaintiff's title to sue on the said indenture. Joinder in demurrer.

The case was argued in Easter term last (a).

*J. W. Smith* in support of the demurrer. The point on which the defendant relies is not sufficiently raised by the plea, and, if it were, it is no answer to the action. 1. The

(c) April 28, before Lord Denman C. J., *Little-dale*, *Patteson* and *Coleridge* Js.

notice that by the words *Kingdom of Ireland* were intended that part of the United Kingdom of Great Britain and Ireland called Ireland.

To a declaration in debt on indenture, by an administrator, who made profert of letters granted by the Archbishop of Canterbury, the defendant pleaded that at the time of the intestate's death the indenture was "without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland," and was not then in the diocese of Canterbury, but was of the notable goods of the deceased, to be administered within the kingdom of Ireland:"—Held, a sufficient defence, although the plea did not deny that any Irish administration had been obtained, and did not shew by what jurisdiction in Ireland the indenture ought to have been administered, and that the Court would take

1840.

WHYTE  
v.  
ROSE.

plea alleges that the deed on which the action was brought was without the province of Canterbury, but does not allege that it was within any other diocese in which probate can be granted. It mentions the kingdom of Ireland, but there is no such kingdom, and the Court cannot take notice judicially that Ireland is meant, or that that country possesses any jurisdiction to grant administration of wills. But the plea is in effect a plea to the jurisdiction of the archbishop, and therefore it should have given the plaintiff a better writ. [Lord *Denman* C. J. I doubt whether that rule applies, except where another common law jurisdiction is suggested.] The principle applies, because it may be that the deceased died in a country where there was no competent Court to grant probate, or where a deed may not be considered a specialty, and would therefore follow the person of the deceased, and it is not alleged where the deceased died. But, if the deceased was domiciled in England, the rights of the party constituted representative in England "are not limited to the personal property in England, but extend to such property wherever locally situate:" *Spratt v. Harris* (a), per Sir J. Nicholl, and *Price v. Dewhirst* (b). In that case the testator died in France, leaving a will disposing of property in France, and it was held that probate was rightly granted by the Prerogative Court of Canterbury. 2. Even if the plea were properly framed the rule is clear that a foreign administrator cannot sue in England till he has obtained probate here; 1 *Will. Executors*, 226 (c). "If a foreign executor should find it necessary to institute a suit here, a personal representative must be constituted to administer *ad litem*," per *Richards* B., in *Attorney General v. Cockerell* (d), *Tourton v. Flower* (e), *Lowe v. Fairlie* (f), and *Logan v. Fairlie* (g), establish the same point. The last case cited was one of administration granted in the British dominions in India, but it

(a) 4 Hagg. Ecc. Rep. 405.

(b) 4 Mylne &amp; Cr. 76.

(c) 2nd ed.

(d) 1 Price, 179.

(e) 3 P. Wms. 369.

(f) 2 Madd. 101.

(g) 2 Sim. &amp; Stu. 284.

was held that, to institute a suit in this country, the administrator must clothe himself with an English probate. But Ireland is as much a foreign country in these matters as India. The second point, decided in *Carter v. Crost* (a), is express that Irish letters of administration are not sufficient, where the plaintiff sues here *as administrator*, though it is admitted that they may be sufficient where he sues here in his own right, and makes titles through Irish letters of administration. *Swift v. Swift* (b) is a converse of the decision, by the Courts in Ireland. There, a person who had been arrested on a *ne exeat regno* for a debt due to an intestate, by a person who had obtained administration in England, was discharged because no administration had been taken out in Ireland.

1840.

WHYTE  
v.  
ROSE.

Sir *F. Pollock* contra. 1. The plea is not strictly a plea to the jurisdiction, and it was unnecessary to shew a jurisdiction elsewhere. There are many cases where the jurisdiction may be excepted to without shewing another jurisdiction, as for instance in the case of crimes committed abroad before the statute allowing in some cases a trial here. As to the domicile not being shewn, the common law takes no notice of it nor of the law of foreign countries. *Coke*, *Comyn*, *Viner*, *Bacon* and *Blackstone*, are all silent upon domicile. 2. The question here is, whether the Archbishop of Canterbury has any jurisdiction over a specialty in Ireland. By art. 5 of the Act of Union, 39 & 40 *Geo. 3*, c. 67, the churches of England and Ireland are united into one church, and the Court will take notice that there is no part of Ireland that is not subject to some ecclesiastical jurisdiction. The law of both countries is the same, and therefore it is not like asking the Court to take notice of any foreign law, as of the Scotch. [*Coleridge J.* Does your argument go the length of contending that an Irish probate would be sufficient for a plaintiff to sue with in this country? for, if so, that is contrary to what was laid down by *Richards B.*] There is no decision since the Act of Union that an Irish probate would

(a) *Godb.* 33.

(b) 1 *Ball & Beatt.* 326.

1840.  
  
 WHYTE  
 v.  
 ROSE.

not be sufficient. By the 31 *Edw. 3*, c. 11, the ordinary is to grant probate, and it seems to have been always assumed that the ordinary, whether English or Irish, was the proper person to grant probate. Thus, in *Comyn*, Administrator, B. 3, if one "has *bona notabilia* in Ireland and also in England, it shall be granted by the Archbishop of Dublin for the goods in Ireland, and by the Archbishop of Canterbury for the goods in his province," citing 1 *Roll.* 908, l. 40. So also 3 *Bac. Abr.* 460 (a). But, if there are *no bona notabilia* in England, where is the necessity for an English probate? *Currie v. Bircham* (b) also shews that an Irish probate would be sufficient. But all that it is necessary to contend for here is, that an Irish probate is required: whether an English probate *ad litem* is also necessary is another question.

*J.W. Smith*, in reply. If any facts are left doubtful by the defendant on the record, it must be intended that the Archbishop of Canterbury had jurisdiction; otherwise every declaration in which profert is made of a prerogative probate would be demurrable. If it is not necessary to allege another jurisdiction in the plea, it is singular that all the precedents in which a Canterbury or York probate is sought to be avoided should be otherwise: *Yeomans v. Bradshaw* (c), *Hilliard v. Cox* (d), *Chitt. Plead.* 6th ed. 815. All that the plea shews is, that the deed was not *bona notabilia* in the province of Canterbury, but that does not exclude the Archbishop of Canterbury's jurisdiction, as is shewn by *Sprutt v. Harris* (e), where a Canterbury probate was held valid as to goods in France. And indeed, even if an Irish probate were necessary, it would be assumed that the probate of the Archbishop of Canterbury had been granted upon the production of one.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the

(a) 7th ed.

(b) 1 D. & R. 35.

(c) *Carth.* 373.

(d) 1 Salk. 37.

(e) 4 Hagg. Ecc. Rep. 405.

1840.

  
 W HYTE  
 v.  
 ROSE.

Court.—This was an action of debt on an indenture made between the intestate and the defendant. The plaintiff made profert of letters of administration granted by the Archbishop of Canterbury. The plea shews that the intestate was a British subject and died at Halifax in Nova Scotia; that at the time of her death the indenture was at Dublin, in Ireland, and was bona notabilia to be administered there. To this plea there was a demurrer, shewing for cause that the plea does not shew bona notabilia in any province or diocese in England without the province of Canterbury, but, on the contrary, shews that the indenture was beyond the seas. It was argued that the plea was in the nature of a plea to the jurisdiction of the archbishop, and ought to shew a proper jurisdiction. This is not strictly so; it is a plea in bar, but still it may be true that it ought to shew some other jurisdiction, because it may be that the letters of administration of the Archbishop of Canterbury are in all cases good, unless it be shewn that the granting them belongs to some one else. Now, if this indenture had been alleged to have been in the province of York, there is no doubt that the plea would have been good. The question is therefore reduced to this, whether the Court is bound to take judicial notice that the granting letters of administration of goods in Ireland belongs to some authority there. We take the words of the plea “the kingdom of Ireland,” to mean “that part of the united kingdom of Great Britain and Ireland called Ireland,” no doubt we are bound to take such judicial notice. In 2 *Lev.* 86, *Shaw v. Stoughton*, dictum fuit per *Hale*, et nemy deny, si home morust aiant biens en les several provinces de York et Canterbury several administrations doint estre commit et issint si en Angleterre et Ireland. But it is said that Irish letters of administration would not enable the administrator to sue here. The cases cited by no means establish that proposition as regards an action for goods in Ireland, whatever may be the case, if the action be for goods in England; but at all events they do not dispense with Irish letters of administration, even if it be necessary to add English letters ad litem, which the letters

1899.  
 WITTE  
 v.  
 LANE.

in the present case are not. No case establishes that the Archbishop of Canterbury has original jurisdiction over bona notabilia in Ireland. Our judgment must therefore be for the defendant.

Judgment for the defendant.

Wednesday,  
 June 24th.

BAYLEY v. ASHTON.

An acknowledgment of part payment by a defendant, to take a debt out of the Statute of Limitations, under 9 Geo. 4, c. 14, s. 1, must not only be in writing, but be signed by him.

**INDEBITATUS** assumpsit for money paid to the defendant's use.

Plea: the Statute of Limitations.

At the trial before Alderson B., at the Liverpool spring assizes, 1839, a question was raised whether a demand on account of 24l., money lent to the defendant in December, 1829, was not taken out of the Statute of Limitations by his acknowledgment, under the following circumstances, of a part-payment in April, 1833. The defendant had been clerk to the plaintiff, and the following entry in his handwriting in the plaintiff's ledger was the acknowledgment relied on:—

Mr. Thomas Ashton (the defendant), with Mr. Bayley.

Dr.		Cr.
1829.		1833.
Dec. 19. To cash lent you to	April 17. By cash from your	
settle the action	father on account	
in <i>M'Cleland v.</i>	of the 24l. lent £1 0 3	
your father . . £24		

The two items above were followed by various other items on either side of the account. The whole entry, with the heading of the defendant's name, was in his handwriting, but it was not otherwise signed. At what time the heading was written did not appear. Verdict for the defendant, subject to a motion to enter the verdict for the plaintiff for 22l. 19s. 9d.

A rule nisi having been obtained in the following Easter term,

*Wortley* and *W. H. Watson* now shewed cause. The 9 Geo. 4, c. 14, s. 1, after enacting "that no acknowledg-

ment or promise by words only" shall take a case out of the Statute of Limitations, unless the acknowledgment or promise shall be in writing and "signed" by the party chargeable, provides that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The effect of a payment by the defendant is saved by the proviso, but the evidence of such payment, when the evidence consists of an acknowledgment by the defendant, must, by the previous part of the section, be "in writing and signed" by him. "No" acknowledgment by words only is sufficient, whether it be of a part-payment or of the original liability. *Willis v. Newham* (a), (recognized in *Waters v. Tompkins* (b)), which decides that a verbal acknowledgment of the payment of part of a debt is insufficient, governs the present case, for the present acknowledgment, though written, is not signed by the party charged, and therefore is of no greater force than a mere verbal acknowledgment. The policy of the statute, which was to guard against the misrepresentation of what may have been said by the party charged, would exclude an alleged verbal acknowledgment by the defendant, whether of a payment or of any thing else. "The payment of principal or interest," says *Tindal* C. J., in *Wyatt v. Hodson* (c), "stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." These observations apply to the fact of payment, when proved, but not the mode of proving that fact by the verbal acknowledgment of the defendant. The statute is construed so as to protect the party charged: *Hyde v. Johnson* (d), where it was held that an acknowledgment signed by the debtor's agent, was not sufficient.

The defendant's name at the top of the account was pro-

(a) 3 Y. & J. 519.

(b) 2 C., M. & R. 723.

(c) 8 Bing. 312.

(d) 3 Scott, 289.

1840.

~~~~~  
BAYLEY  
v.  
ASHTON.



1840.

BAYLEY

v.

ASHTON.

bably written at the time of commencing the account in 1829, and not contemporaneously with the item in 1833.

*Wightman* contra. *Willis v. Newham* (a) does not apply. The acknowledgment of part payment in this case was not proved by "words only," but by the defendant's own handwriting; and the exposition of *Willis v. Newham* in *Waters v. Tompkins* (b) shews that the former authority is to be confined to verbal acknowledgments only. [*Patteson* J. Where *written words* are required by the statute, must they not also be *signed words* ?] In *Trentham v. Deverill* (c) there was no direct evidence of payment, and *Willis v. Newham* (a) seems to have been understood of oral admissions only.

LORD DENMAN C. J.—I confess that if I had to construe the statute without reference to cases already decided, I should have thought payment and acknowledgment were to be treated as two things entirely different, and that payment might be proved by any evidence that would have been sufficient before the statute; consequently that, if proved by acknowledgment, the acknowledgment need not be in writing, or, if in writing, signed. But the cases in the Exchequer put a different construction upon the act. This case must be governed by them, and I yield to them without reluctance, for, no doubt, if the point had occurred to the framers of the act, they would have provided for it in conformity with those authorities, which clearly advance the policy of the act.

LITLEDALE J.—Under the statute the part payment must be proved either by direct evidence of it as a substantive *fact*, or by the acknowledgment of the party to be charged; and, if the mode of proof is by such acknowledgment, it must be in writing, and signed by him on the footing of any other acknowledgment under the statute. In *Trentham v. Deverill* (c) the witness gave evidence of

(a) 3 Y. &amp; J. 519.

(c) 3 Bing. N.C. 397.

(b) 2 C., M. &amp; R. 723.

the immediate fact of payment, and not of its acknowledgment.

1840.

BAYLEY

v.

ASHTON.

PATTESON J.—*Willis v. Newham* (a) has not been impugned, and in *Trentham v. Deverill* (b) the witness did not give evidence of the defendant's acknowledgment of part payment, but of the part payment itself; the memorandum of the part payment in the handwriting of the witness was put into his hand merely to refresh his memory as to his having made the payment in question for the defendant. It has been decided that a written acknowledgment of part payment by the party to be charged is necessary under the statute; but, if the statute is resorted to to this extent, it must be followed throughout, and then it is plain that this same acknowledgment, which must be written, must also be signed.

WILLIAMS J. concurred.

Rule discharged.

(a) 3 Y. & J. 519.

(b) 3 Bing. N. C. 397.

### KING v. BURRELL.

Saturday,  
June 20th.

DEBT against the defendant, as overseer, for a penalty of 50l., under 5 & 6 Will. 4, c. 76, s. 48.

The mere omission, whether wilful or not, to sign the

burgess list, under 5 & 6 Will. 4, c. 76, s. 15, subjects an overseer to the penalty under sect. 48.

A declaration in debt against an overseer for such a penalty stated that it was the duty of the defendant, and of the other overseers of the parish, to make out and sign the burgess list; that the defendant, as such overseer, ought to have signed, but that the defendant did not make out and sign such list. Plea, not guilty "by statute."

On motion in arrest of judgment, on the ground that signature by the majority of overseers would be sufficient, as being virtually the signature of all, and ought, therefore, to have been negatived by the declaration, held, that the defect, if any, was cured by the verdict, because, if the signature of the majority would have been the signature of all, it had been negatived by the verdict, which found that the *defendant* had not signed.

*Semble*, per Patteson J. that all the overseers must sign the burgess list; and that where the parish consists of several divisions, and has an overseer acting separately for each division, the statute is not satisfied by each overseer signing a separate list for his own division only.

1840.  
  
 KING  
 v.  
 BURRELL.

The declaration stated that the defendant heretofore, and before and at the time of the neglect and refusal hereinafter mentioned, to wit, on the 5th September, 1838, was one of the overseers of the poor of the parish of Saint Margaret, in the borough of King's Lynn, Norfolk. That it was the duty of the defendant, as such overseer, and of the other overseers of the poor of the parish, on the said 5th September, to make out an alphabetical list of the burgesses in the said parish, of all persons who should be entitled to be inrolled in the burgess roll of the said borough for that year, according to the provisions of the statute in such case made and provided, in respect of property within the said parish. That the defendant, as such overseer, *ought to have signed such burgess list*, and ought to have delivered the same so signed to the town clerk of the borough on the day and year last aforesaid. Yet the defendant not regarding &c., on the day and year last aforesaid, unlawfully did neglect and refuse to make out and sign such burgess list as aforesaid, for the said parish, for the year aforesaid, and did not then or at any time before or since make out and sign the same, contrary to the statute &c., whereby &c., defendant forfeited for his said offence 50*l.*, &c. &c.

Plea: not guilty, "by statute."

The case was tried before *Tindal* C. J., at the Norwich spring assizes, 1839. The defendant, at the time in question, was one of the overseers of the parish of St. Margaret, in the borough of King's Lynn. The parish of St. Margaret has always been divided into nine parochial wards, and has nine overseers, one appointed for each ward. Each overseer, both in parochial matters and in the making out of the burgess lists, acts solely for his own ward. In September, 1838, the defendant and the other overseers severally delivered to the town clerk each his separate burgess list for his own division of the parish. The defendant's list was not signed by him or the other overseers, but his name appeared in the body of the list as one of the burgesses; the eight other lists were each signed with the single name

of the overseer who delivered the list. The defendant delivered his list personally at the town clerk's office, and while there made an alteration in presence of a clerk in the office.

On behalf of the defendant it was contended, that proof of the above facts did not bring the case within 5 & 6 *Will.* 4, c. 76, s. 48, which enacts that "if any overseer of any parish &c. shall neglect or refuse to make out, sign, and deliver such list as aforesaid &c., every such overseer &c., for every such offence shall forfeit and pay the sum of 50*l.*," because it was not shewn that the defendant had either refused, or had corruptly or wilfully neglected to sign his list. It was also contended that the penalty imposed was for neglect of three things, viz. the making out, signing, and delivery of the list, whereas the defendant had merely neglected to sign; that the defendant had authenticated his list by personally delivering and correcting it, and that this was sufficient, without his signature, and that the signatures of the other eight overseers, being a majority, were the signatures of all. The Lord Chief Justice was of opinion that the case was within the statute, and directed a verdict for the plaintiff, subject to a motion to enter a nonsuit.

A rule having been obtained accordingly, and also to arrest the judgment, on the ground that the declaration should have stated that the defendant's omission to sign was wilful, and should have negatived that the list was signed by the majority of the overseers,

*Kelly* and *O'Malley* now shewed cause. The defendant has rendered himself liable to the penalty under 5 & 6 *Will.* 4, c. 76, s. 48, for non-compliance with the provisions of the 15th section, which enacts that "on the 5th day of September in every year the overseers of the poor of every parish, wholly or in part within any borough, shall make out an alphabetical list, to be called 'the Burgess List,' according to the form No. 1 in the schedule (D) to this act annexed, of all persons who shall be entitled to be inrolled in

1840.

~  
KING  
v.  
BURRELL.

1840.  
~  
KING  
v.  
BURRELL.

the burgess roll of that year, according to the provisions of this act, in respect of property within such parish; and the overseers shall sign such list, and deliver the same to the town clerk of the borough on the said 5th day of September in every year." It is not necessary to contend that any trifling deviation from the form of list prescribed would constitute the offence punishable under the 48th section, for the deviation in the present case is of a substantial kind. The statute intended to inflict the penalty on an overseer omitting to sign the list, whether his omission is wilful or not. All that is required from the overseer is the bare act of signing, which calls for no exercise of judgment; and it is not unreasonable that he should be punished even for the mere neglect to do what is so easy of performance, and without which the list is imperfect and the rights of parties are prejudiced. In the Reform Act (2 Will. 4, c. 45, s. 76), where a penalty is imposed on any officer who neglects his duty under the act, the word "wilfully" is used, and it is fair, therefore, to suppose it would have been introduced in this act also, if wilfulness were a necessary part of the offence provided against.

The defendant is not entitled to arrest of judgment on the ground alleged, that it is sufficient if the majority of the overseers sign, and that the declaration does not state that the majority did not sign. All the overseers must sign. The 15th section, which imposes the duty, speaks in the plural number, and there is nothing to indicate that the duty is not to be performed by all the overseers, and the 48th section, which imposes the penalty, says, that if "any overseer" shall neglect to make out and sign the list, "every such overseer" shall incur the forfeiture. All therefore are required in general terms to sign, and if any one of the whole number does not sign he is punishable. But, if the signature of the majority could be taken as virtually the signature of *all*, it would be the signature of the defendant also, and the declaration, which alleges that *he* did not sign, must be

Understood to allege that the majority did not sign. After verdict, at all events, it must be taken that the majority did not sign, for otherwise the issue on the fact of his signing, which, it is said, would be included in the signing of the majority, could not have been found against him. On this point 1 *Wms. Saund.* n. (1) to *Stennel v. Hogg*, *Wilkinson v. Malin* (a), *Harris v. Beavan* (b), *Nurse v. Wills* (c), *Weston v. Mason* (d), *Rex v. Horne* (e), *Bennett v. Edwards* (f), and *Rex v. Holland* (g), were referred to.

1840.  
  
 KING  
 v.  
 BURRELL.

Sir J. Campbell A. G., Biggs Andrews, and Gunning contra. Unless the conduct of the defendant has been wilful the case is not within the statute. The penalty is not imposed if an overseer "omits" to sign, but if he "neglects or refuses." The introduction of "neglect" in juxtaposition with "refusal," shews that the neglect is something just short of refusal, to which a previous demand is necessary; that the two matters are of a similar character, and that the neglect must be something more than simple inadvertence. With regard to the section of the Reform Act, which has been cited, it is to be supposed that, as the duties under the two acts are much the same, so the degree of neglect punishable as an offence under them would also be the same, and therefore that a party is not liable to the penalty in this case unless he has acted wilfully. If a deviation from the requirements of 5 & 6 Will. 4, c. 76, is to be punished, whether wilful or not, any departure from strict alphabetical order in the names on the list will make the overseer liable. The defendant authenticated his list at the town clerk's office, and this supplied all the purposes of signature. But in point of fact the defendant had signed the list, for his name appeared in the body of the list delivered in by him, which has

(a) 2 Tyr. 544.

(b) 4 Bing. 646.

(c) 4 B. &amp; Ad. 739; S. C. 1 N. &amp; M. 765.


(d) 3 Barr. 1725.

(e) Cowp. 673.

(f) 7 B. &amp; C. 586; S. C. 1 M.

&amp; R. 482.

(g) 4 T. R. 457.

1840.  
  
 KING  
 v.  
 BURRELL.

been held a sufficient signature within the Statute of Fraud  
*Saunderson v. Jackson (a)*.

The declaration is bad, and is not cured by verdict, for the necessary allegation that the majority of the overseers did not sign is wanting. It has often been determined that the act of the majority is the act of a whole body: *Reg. Justices of Cambridgeshire (b)*. The allegation was necessary, for the declaration states that it was the duty of the defendant and of the other overseers to make out a list, and the breach is, that the defendant did not make out and sign the list, so that it is consistent with the declaration that the list was completed in all respects by the other overseers, and that no offence was committed. This defect in the declaration is not cured by verdict: *Jackson v. Pesked (c)*, *Hayter v. Moat (d)*.

LORD DENMAN C. J. (after reading the 15th and 48th sections).—It is material to observe that these two sections furnish the security for carrying some of the most important provisions of the act into effect. The 15th section prescribes the duty to be performed by the overseers, and there is nothing but the 48th section to direct the mode of punishing them, if they neglect or refuse to perform that duty. The declaration properly states that the defendant had neglected and refused to make out and sign the burgess list of the parish. But it is said he is entitled to a nonsuit, because in point of fact he has not neglected to make out and sign the list, or that, if he has neglected this, he has not done so wilfully, and, therefore, that the penalty under the 48th section does not attach upon him.

The parish is divided into nine wards, one overseer appointed for each ward, and each acted for his particular ward. Eight of the overseers signed their respective lists but the defendant, acting for the ninth ward, did not sign it.

(a) 2 B. & P. 238.

(c) 1 Mau. & S. 234.

(b) 7 A. & E. 480; S. C. 1 P. & D. 249.

(d) 2 M. & W. 56.

list in question. Such being the facts, the case appears to me to be directly within the 48th section. It is said that the appearance of his name in the body of the list delivered in by him constituted his signature, by analogy to cases upon the Statute of Frauds. But I think the introduction of his name in this manner was not a signature within the meaning of the Municipal Corporation Act, and that his name should have been signed at the bottom of the list. It was then contended that, if he had not in truth signed the list, he had not at all events wilfully omitted to sign it, and that no offence was shewn within the meaning of the statute; and further, that the want of an allegation that he had acted wilfully was a ground for arresting the judgment. In my opinion it was unnecessary to charge or prove that the defendant had acted wilfully. Parties entrusted with a public duty of this sort must be taken to know the provisions of the statute relative to the performance of their duty, and, if they fail to comply with those provisions, are properly punishable for neglect. I believe it was the intention of the legislature that they should be so punishable, and that the legislature has acted wisely in this respect, for, if in every instance where an officer has neglected his duty, an investigation is to take place, whether he has been guilty of wilful misconduct or has been influenced by corrupt motives, there would be no end to the inquiries that might become necessary; and juries, from a natural feeling of lenity, which often leads to the defeat of justice, would not suffer a penalty of 50*l.* to be inflicted for an act of mere carelessness. It may be true that this penalty for mere omission is severe, but omissions from incapacity and from negligence are not the same thing, and it seems to me that the legislature meant the penalty to fall on the sort of negligence charged against the defendant. As to the consequence, said to follow from a strict construction of the words of the statute, that the slightest departure from exact alphabetical order in the names on the list would subject an overseer to the penalty, no such consequence would ensue. The statute does not

1840.

~~~~~

KING

v.

BURRELL.



1840.  
KING  
v.  
BURRELL.

require the perfect alphabetical succession of every letter that would be expected from a dictionary compiler, but such a general alphabetical arrangement of the names as will make the list capable of easy reference. Small objections of this sort do not create any difficulty in the case.

Then it is said, in arrest of judgment, that the declaration is bad, because, though it alleges that this defendant did not make out and sign the list, it does not allege that the list was not in fact made out and signed. But each party is to answer for his own conduct, and the conduct of others cannot make any individual either more or less culpable than he is by his own act. It was argued that the act of the majority of the overseers would be the act of all, and that it is consistent with this declaration that the majority did sign the list, so as to satisfy the statute. But, if that would have been a good defence, it must, in this stage of the proceedings, be assumed to have been negatived, for otherwise the defendant could not have been guilty of the omission which has been ascertained by the verdict.

I am of opinion that it is the duty of all the overseers to sign the parish list; that if any one of them neglects to do so he is liable to the penalty imposed by the statute, and that the fact of the other overseers having signed particular portions of the list, if he does not sign his portion, such portion being as necessary as any other to make the list complete, will not excuse him.

PATTESON J.—I am of the same opinion. The argument in arrest of judgment must assume that signature by the majority of overseers would do, for unless such signature would do, it would not be necessary that it should be negatived in the declaration. But, even assuming that the signature of the majority would do, the want of an averment negating their signature is cured by the verdict. For, if the act of the majority be the act of all, it would be the act of the defendant also, so that the issue taken as to the fact of signing would make it necessary to prove that the

majority had not signed, or the verdict would not be warranted.

But did the majority of the overseers sign the list? Nearly not. The ninth list is not signed by any one, and it is impossible to say it was virtually signed by the eight overseers, who never saw it. I may observe, in passing, that these lists appear to me to be bad altogether. The division of the parish into districts does not vary the duty cast upon the overseers under 5 & 6 Will. 4, c. 76, s. 15, according to which I think there should be but one list for the parish. But it is not necessary to determine this point. I think, however, that the list, whatever be its form, should be signed by all the overseers. Generally the act of the majority is the act of the whole body, and I should say it would be so in this case, if the duty had been cast upon the overseers in merely general terms. But the 48th section makes it clear that the list must be signed by all; it says, if "any" overseer neglects, "every such overseer" is to forfeit 50*l*.

1840.

KING  
v.  
BURRELL.

The next question is, whether the overseer is subject to the penalty, if his neglect to sign the list has not been wilful, in other words, whether the word "wilfully" is to be imported into the 48th section of this act. For myself I will say that I am every day more and more convinced of the impropriety of importing any thing into acts of parliament: it is a practice that leads to difficulties without end. It is much better to follow the language of the act, where it uses plain words, and to give effect to them. Sometimes we are obliged to import some term into an act to avoid contradiction, but there is no difficulty of that sort here. The penalty is incurred by "neglect." What does neglect mean? It means the omission to do an act which a man is bound to do, and can do. The defendant could sign the list and did not sign it, and he has incurred the penalty, whether he acted wilfully or not.

I am not at all pressed by the absurdity which our interpretation of the 48th section is said to lead to. It is said that

1840.  
  
 KING  
 v.  
 BURRELL.

as the 15th section calls upon the overseer to make out and sign an alphabetical list, and the 48th section punishes him if he neglects to sign "such list as aforesaid," the overseer will be liable if a single letter in the alphabet is out of its place. I do not so read the act; it merely means that the list is to be of a certain description, viz. alphabetical, and that description would be answered even if a letter or two were misplaced. If a list were sent in without any attempt at alphabetical arrangement, that might admit of a different consideration, but any trifling error in this respect would not constitute a breach of duty. Whether the penalty for a corrupt or for an inadvertent omission of duty ought to be the same, we need not inquire. As far as this act is concerned the penalty is the same, though in the case of a corrupt omission, a party might also be exposed to other additional punishment.

WILLIAMS J.—I am of the same opinion. If we were to import the word "wilful" into this statute, we should introduce entirely new terms, and such as would imply perhaps that the overseer could not commit the offence contemplated, unless there had been a demand upon him and refusal. The omission to do an act required is, in common acceptance, a "neglect" to do that act. There were nine divisions of this parish, and the defendant did not sign the list for his division. That was a breach of his duty within the statute. Each overseer appears to have acted for himself in his own division; it is difficult therefore to see how the act of one overseer in district A. can help over another overseer in district B. The only remaining question is as to the arrest of judgment, and I quite agree that, if signature by a majority would do, it must now be taken to have been proved that the majority did not sign.

COLERIDGE J.—I am of the same opinion, although I hesitated some time on account of the severe consequences that attend our construction of the act. The first question

is, whether the act has been contravened. I think it has been. If all the overseers must sign the list, it is clear that has not been done; and, if a majority may sign for all, I think no list for this parish has been signed by a majority, for each overseer, who signed, signed a certain part only of the list. Either way the provisions of the act have not been complied with. The next question is, has the defendant acted such a part as to be liable to the penalty? He has not signed any list; has he "neglected" to sign? I think he has, for he has omitted to do what it was in his power and in his duty to do, without lawful excuse, for mere carelessness or forgetfulness is no excuse. The same penalty, being applicable to gross misconduct and to mere inadvertence, may press unequally, but so the law is written, and it is not for us to alter it.

1840.  
KING  
v.  
BURRELL.

Rule discharged (a).

(a) See *Reg. v. Price*, 3 P. & D. 421, an indictment for neglecting to inform the registrar of the birth of a child, under 6 & 7 Will. 4, c. 86; and *Carpenter v. Mason*, (post, M. T. 1840,) as to an overseer wasting parish property.

JONES v. WILLIAMS (b).

**BUSBY**, in Easter term, 1839, obtained a rule to shew cause why a writ of fi. fa., issued in this cause, should not be set aside for irregularity.

The cause, and all matters in dispute therein, had been referred under certain articles of agreement between the parties; and the arbitrator had awarded that a verdict should be entered for the defendant, and that a sum was due from the plaintiff to the defendant, which he directed the plaintiff to pay accordingly. No judgment was entered up, but the agreement of reference was, after the publication of the

Where an agreement of reference, under which an award is made for payment of money, is made a rule of Court, the money is not payable by the rule; and therefore execution for the amount cannot issue under 1 & 2 Vict. c. 110, s. 18, which enacts

(b) Decided in the sittings after Mich. T. 1839.

that all rules of Court, whereby any money is payable, shall have the effect of judgments.

1840.

JONES

v.

WILLIAMS.

award, made a rule of Court, and then the fi. fa. had issued ~~to~~ to levy the amount.

*R. V. Richards* and *Wightman* shewed cause, and *Busby* supported the rule, in the following term (a).


*Cur. adv. vult.*

LORD DENMAN C. J., at the sittings after Michaelmas term following, delivered the judgment of the Court.—The question depends on the construction of the stat. 1 & 2 *Vict.* c. 110, s. 18, by which all decrees of courts of equity, and all rules of courts of common law (amongst other orders), whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges or expenses shall be payable, shall be deemed judgment creditors; and then, after alluding to proceedings in other courts, it says that all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid.

The rule on which it is contended execution may be issued embodies the submission to arbitration, whatever it may be; and it may be such, as that nothing can be taken into consideration but the claim of a debt from one party to the other, or it may be a question of mutual accounts, or it may be of money payable in connection with other matters, or out of which money, not originally contemplated, may nevertheless become payable, or it may be of matters in respect of which no monies can ever become payable, or it may be of all matters in difference under which money may or may not be payable. In no one instance of submission to arbitration is any money whatever to be payable by the rule; and then the question is, whether, if money be awarded

(a) June 12, before Lord Denman C. J., *Littledale*, *Patteson* and *Williams* Js.

to be paid, it becomes payable by the rule, by reference to it, by the consent of the parties, that an award may be made, and, as it were, embodying an award made by consent into the rule by relation, as if the award itself was part of the rule, and whether this goes to make it payable by the rule, within the meaning of the act.

1840.  
  
 JONES  
 v.  
 WILLIAMS.

It is undoubtedly money payable by something arising out of and connected with the rule, but then can the award be engrafted on the rule, so as to make the money payable by the rule?

The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself. These rules are to have the effects of judgments which are to charge the land, and therefore the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that the purchasers or creditors may know what it is. Judgments are to bind the land from the time directed by law. But, when rules like this are made, they also ought to bind the land at the time they are entered, but at that time there is nothing to inform any body of the charge; the amount may not be ascertained for a year afterwards.

It may be said that when the award is made it may be binding from that time. But then there is no process or any known mode of proceeding, at present at least, for making the award a matter of record; and, if so, then a rule of this sort could have no effect till that was done, and any execution issued before that would be premature.

Then again there are great difficulties attending it, supposing the award could be put upon any rule, so as to make it a matter of record. There may be not merely sums payable by one party alone to the other, but there may be cross payments, arising out of their mutual claims; these would have to be balanced; so there may be payments dependent upon other things directed by the award. There may be other difficulties, not occurring at the moment.

We therefore think that the power of issuing execution

1840.

JONES  
v.  
WILLIAMS.

on a rule must be confined to cases where the money payable by the rule is expressed in the rule itself; but this is not the case here.

There is no difficulty in giving effect to the act of parliament as to awards, if a proper case is made out, and that is by calling on the delinquent party to shew cause why he should not pay a certain sum of money, pursuant to the award. If that rule be made absolute, an execution may issue for the sum distinctly specified in the rule so to be obtained.

Rule absolute.

Friday,  
June 19th.

Devise to T.A. the grandson of my brother in fee, charged with 100*l.* to each and every of the brothers and sisters of J. A.

After it had been shewn that the brother of the testatrix had two grandsons named J. A., the one with several brothers and sisters, and the other with only two brothers and one sister, held that evidence was admissible of a declaration by the testatrix, some months after making her will, that she had devised the property in question to the J. A. who had only two brothers and one sister.

DOE d. JOHN ALLEN v. ALLEN and another.

EJECTMENT for lands in Gloucestershire.

At the trial of the cause before *Patteson J.* at the Gloucestershire spring assizes, 1839, the following facts appeared.

*Hannah Coleman* by will dated the 1st of March, 1814, after giving a life estate in the premises in question to her brother *Thomas Allen*, devised the same "unto and to the use of *John Allen*, the grandson of my said brother *Thomas*, his heirs and assigns for ever, charged nevertheless and I hereby charge the same with the payment of the sum of 100*l.* of lawful money of Great Britain to each and every of the *brothers and sisters* of the aforesaid *John Allen*, to whom I give the same accordingly, and I direct the same to be paid to them respectively within one year after my decease."

*Thomas Allen*, the brother of the testatrix, had two sons, *Richard* and *Thomas*. *Richard* had six children, sons and daughters, living at the date of the will, of whom the lessor of the plaintiff, *John Allen*, was one. *Thomas*, the other son of the brother of the testatrix, had two sons, of whom *John Allen*, represented by the defendant, was one, and one daughter.

For the lessor of the plaintiff it was contended that he

was entitled as being the only *John Allen*, (satisfying the description in the will in other respects also,) who had several brothers and sisters. On the other hand it was shewn that, if he were the party to take, the property was not of sufficient value to bear the charge of 100*l.* to "each and every" of his brothers and sisters; and that the testatrix some months after the date of her will, had said that she had left the premises to the defendant. Verdict for the defendant.

1840.  
  
 Doe  
*d.*  
 ALLEN  
*v.*  
 ALLEN.

*Ludlow* Serjt. obtained a rule nisi for a new trial on the ground that evidence of the declaration of the testatrix ought not to have been admitted.

*Whitmore* shewed cause. The ambiguity in this case does not appear from the will itself, but is raised by extrinsic evidence, and may therefore be removed by the same evidence; *Cheyney's* case (*a*), *Jones v. Newman* (*b*), and *Counden v. Clerke* (*c*).

Part of the extrinsic evidence received shews that the devisee (whether the one *John* or the other) is described correctly, and this justifies the reception of the further extrinsic evidence, consisting of the testatrix's declarations, to shew which *John* she intended. If the devisee had been incorrectly described, the declarations of the testator might not have been admissible: *Doe d. Hiscocks v. Hiscocks* (*d*). There the testator devised to his grandson *John*, eldest son of *J. H.* From the extrinsic evidence it appeared that *J. H.* had been twice married, that he had one son by his first wife, named *Simon*, and that *John* was the eldest son by his second wife. Evidence of the testator's declarations was rejected, but the extrinsic evidence already admitted had shewn that the description in the will, whether applied to the one grandson or the other, was incorrect, as the one had not the name of *John*, and the other was not the eldest

(*a*) 5 Rep. 68, a.

(*b*) 1 W. Bl. 60.

(*c*) Hob. 29.

(*d*) 5 M. & W. 363.



1840.

DOE  
 &  
 ALLEN  
 v.  
 ALLEN.

son of *J. H.* The present case, therefore, is more like *Doe d. Gord v. Needs (a)*, where the testator's declarations were received to shew that by a devise to *George* the son of *Gord*, he intended *George* the son of *George Gord*, and not *George* the son of *John Gord*. It is not necessary, for the purposes of evidence, that the testator's declarations should be made at the time of making the will. In *Thomas v. Thomas (b)* the declaration rejected was made *previous* to the making the will, and, therefore, did not express the testator's intention *at the time* of making the will, but his previous intention: and in *Whitaker v. Tatham (c)*, though the declaration was subsequent to the will, it expressed the subsequent intention, *i. e.* the intention entertained at the time of the declaration, and not at the time of making the will. Here the intention declared is the intention entertained contemporaneously with the making of the will, and it is not necessary that it should also have been *declared* contemporaneously. The testatrix said she "had left" the premises to the defendant. [*Patteson J.* referred to *Strode v. Russel (d)*.] "A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will as to what he had done (I am speaking as to the time merely), is entitled to more credit than one before the will, as to what he intended to do; for that intention may very well be altered; but he knows what he has done, and is much more likely to speak correctly as to that, than as to what he proposes to do; though these parole declarations are all alike admissible."—Per Lord Eldon C. in *Trimmer v. Bayne (e)*.

*Ludlow Serjt.* The true doctrine is that, where a latent ambiguity is *not* cleared up by extrinsic evidence of facts surrounding the testator, the declarations of the testator may then be resorted to. But here the extrinsic evidence antece-

(a) 2 M. &amp; W. 129.

(d) 2 Vern. 621.

(b) 6 T. R. 671.

(e) 7 Ves. 518.

(c) 7 Bing. 628.

dently admitted did not fail; it shewed that there was only one *John* who had a plurality of both "brothers and sisters." It is part of the description of the devisee that he should have *several* brothers and sisters, for a legacy is left to "*each and every*" of the brothers and sisters of the aforesaid *John*. 'On the comparison of the description with the subject-matter, that which most nearly agrees with it must be taken to have been meant, and evidence is inadmissible to rebut that inference: 2 *Phill. Ev.* 748 (a)." *Doe d. Hiscocks v. Hiscocks* (b) and *Hampshire v. Peirce* (c) are authorities to shew that the declaration was inadmissible, as being contradictory to the description in the will.

*Cur. adv. vult.*

Lord DENMAN C.J. on a subsequent day (June 24th) delivered the judgment of the Court:—The devise in this case was, "to *John Allen* the grandson of my said brother *Thomas*, his heirs &c. charged, nevertheless, and I hereby charge the same with the payment of the sum of 100*l.* to each and every of the brothers and sisters of the aforesaid *John Allen*, to whom I give the same accordingly."

At the time of the making of the will there were two persons of the name of *John Allen*, each being a grandson of the testatrix's brother *Thomas*; one of them (the lessor of the plaintiff) had three brothers and four sisters; the other (under whom the defendant claimed) had one brother and one sister. It was argued for the plaintiff that the words "each and every of the brothers and sisters of the aforesaid *John Allen*" were to be taken as part of the description of the devisee, and that, as one *John Allen* only had more than one brother and one sister, he was the person described conclusively. We think, however, that those words are not part of the description of the devisee, and that they do not conclusively apply the words of the devise to the lessor of the plaintiff, but furnish an argument only in the same

1840.

*Doe*  
*d.*  
*ALLEN*  
*v.*  
*ALLEN.*

(a) 8th ed.

(c) 2 *Ves. sen.* 216.

(b) 5 *M. & W.* 363.

1840.

~~~~~  
 DOE  
 d.  
 ALLEN  
 v.  
 ALLEN.

manner as other evidence of extrinsic facts. This then is a case directly within the authority of *Cheyney's* case (a), and of the recent case of *Doe d. Gord v. Needs* (b). It is also within the very terms of the only case in which, according to the opinion of the Court of Exchequer thrown out in their judgment in *Doe d. Hiscocks v. Hiscocks* (c), declarations of the testator can be received as evidence of his intention. In the whole list of cases on this subject no one can be found in which such evidence, under such circumstances, has been excluded.

The only remaining point is, whether the time when those declarations were made, viz. some months after the will was executed, makes any difference. Cases are referred to in the books to shew that declarations cotemporaneous with the will alone are to be received, but, on examination, none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded. Whenever any such evidence of declarations can be received, they may have more or less weight, according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations. In this case, therefore, the rule for a new trial must be discharged.

Rule discharged.

(a) 5 Rep. 68, a.

(c) 5 M. & W. 363.

(b) 2 M. & W. 129.

JOLLY and another v. BAINES (d).

It is no ground for prohibition to the ecclesiastical court, that deposi-

tions have been improperly taken with reference to 10 Geo. 4, c. 53, s. 9, for this is matter of irregularity in practice only.

A cause for subtraction of church rates is within the exceptive part of 23 Hen. 8, c. 9, and may be referred by letters of request to the Court of Arches, and the defendant be cited out of his diocese.

**MANNING**, in Trinity term last, had obtained a rule, calling upon the plaintiffs to shew cause why a writ of pro-

(d) Decided during the term, June 11.

should not issue to the Arches Court of Canterbury, to prohibit the plaintiffs from further proceeding in the suit on the part of the parties.

The following facts appeared on the affidavits:—On the 1st day, 1838, a church rate was made for the parish of St. Martin, Leicester, to which the defendant was assessed a sum of 2*l.* 5*s.* The defendant refused to pay, and was summoned before the magistrates, under 53 *Geo.* 3, c. 7, by the plaintiffs, who were the churchwardens, to show cause to the legality of the rate. The plaintiffs thereupon obtained letters of request from the commissary of the Court of Lincoln to the official principal of the Court of Arches to cause the defendant to be cited before the said Court in a cause of subtraction of church rates. The letters of request were granted and accepted, and defendant was thereupon cited. The citation recited that the official principal had received letters of request from the commissary of the Bishop of Lincoln in and for the archdeaconry of Leicester, which were in substance as follows: “Whereas *C. H. Jolly* and *W. B.*, churchwardens of, &c., intend to institute proceedings against *W. Baines*, &c. in a cause of subtraction of church rates &c., and have requested us *C. H. Jolly* &c., to grant them letters of request, in order that the said proceedings may be promoted and prosecuted in the Arches Court of Canterbury, and whereas matters of difficulty may arise, wherein the parties may require the assistance of civilians or counsel learned in the law, sitting in the said Arches Court, now we the said *C. H. Jolly* &c. aforesaid, do hereby request you the Right Honourable Sir *H. Jenner*, knight, official principal, &c. to cite the said *W. Baines*, &c.” The citation, after setting out that *H. Jenner* had accepted the said letters of request, directed *W. Baines* “to appear in the Common Hall of Doctors’ Commons, situate, &c., on the sixth day after he shall have received with these presents, if it be a general session, or additional court day of the said Arches Court,

1840.



JOLLY

v.

BAINES.

1840.

JOLLY

v.

BAINES.

otherwise on the general session, by day, or additional court day of the said court then next following."

The defendant did not appear in pursuance of the citation, and on the 9th December was served with a decree, to see and hear further proceedings, which informed him that he was contumacious and in contempt, and that if he did not appear the Court would proceed to hear and determine the matter without him. The defendant still did not appear, and on the 27th April, 1839, was served with a monition for the payment of a rate, 2*l.* 5*s.*, and costs 125*l.*; the Court of Arches having decreed, on the 15th April, in favour of the validity of the rate. The defendant did not pay, and a writ of *significavit* thereupon issued to the Court of Chancery, and a writ of *de contumace capiendo* thereon. The defendant's affidavits set out the proceedings in the Arches Court, by which it appeared that the witnesses for the plaintiffs were not examined in open court, or on any court day, but in chambers, before a surrogate; that the witnesses were not sworn in *pœnam contumaciæ* of the defendant, and that defendant was not at the time of their production thrice publicly called, according to the practice of the Court; that certain of the witnesses were repeated to their depositions on the day following their examinations. The following order of the Court of Arches was also set out:

"17th February, 1830.—The Official Principal of the Court of Arches having taken into consideration the expediency of appointing additional court days for the transaction of business, and of making orders of court for expediting and regulating the proceedings in that Court, has ordered and does hereby order as follows:

(*inter alia*)

"That when proceedings are carried on '*in pœnam contumaciæ*,' witnesses may be produced and sworn before a surrogate in his chambers as well as in open court, and such production shall be immediately entered and recorded in the register book, but the witnesses so examined shall not be repeated to their depositions until forty-eight hours at least shall have expired from the time of their production."

The following were the grounds on which the writ of prohibition was moved: 1. That the order of 17th Febru-

ary, 1830, to authorise the examination of witnesses in chambers, was not warranted by 10 *Geo.* 4, c. 53, s. 9(a), and that, if it were, it had not been complied with, as the witnesses had been repeated to their depositions within forty-eight hours of their examination. 2. That a cause of subtraction of church rates was not within the exceptions contained in 23 *Hen.* 8, c. 9(b).

1840.  
JOLLY  
v.  
BAINES.

*Wightman* shewed cause(c). The objection to the proceedings in the ecclesiastical court, with reference to 10 *Geo.* 4, c. 53, s. 9, even if well founded, amounts to no more than an objection on a point of practice, and so shews a mere defectus triationis, which is no ground of prohibition after sentence: *Ex parte Smyth*(d), *Bac. Abr.* (Prohibition H), *Offley v. Whitehall*(e).

So also with respect to the objection that the defendant could not be cited out of his diocese, in a cause for subtraction of church rates, the objection, if good, is too late

(a) That section enables the judges of the ecclesiastical courts "to appoint new and additional court days for the transaction of business in their several courts respectively, which new and additional court days shall, from and after the appointment thereof as aforesaid, be regular court days for the transaction of business to all intents and purposes."

(b) 23 *Hen.* 8, c. 9, s. 2, enacts "that no manner of person shall be from henceforth cited or summoned, or otherwise called upon to appear by himself or herself, or by any procurator, before any ordinary, &c. or any other judge spiritual, out of the diocese or peculiar jurisdiction, where the person which shall be cited, &c. shall be inhabiting and dwelling at the time of awarding or going forth of the same

citation or summons, except that it shall be for, in, or upon any of the cases or causes hereafter written, that is to say," &c., and by s. 3, "in case that any bishop or inferior judge, having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, bishop, or a superior ordinary or judge, to take, treat, examine or determine the matter before him or his substitute, and that to be done in cases only where the law, civil or canon, doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable."

(c) In E. T. last (April 27), before Lord *Denmun* C. J., *Little-  
dule, Patteson and Coleridge* Js.

(d) 3 A. & E. 719; S. C. 5 N. & M. 145.

(e) Bunb. 17.

1840.

~~~~~  
 JOLLY  
 v.  
 BAINES.

after sentence: *Gardner v. Booth* (a). But the objection is not good, the case is within the fourth exception in 23 *Hen.* 8, c. 9, s. 3. A party may be cited out of his diocese after letters of request, in a suit for brawling: *Ex parte Williams* (b).

Sir J. Campbell A. G. and Manning Serjt. contra. Even if this Court cannot make irregularity of practice a ground of prohibition, the irregularity here amounts to want of jurisdiction, so that there is ground of prohibition even after sentence. If the Court did not proceed conformably to 10 *Geo.* 4, c. 53, it had no jurisdiction to sit on the additional days, and the whole has been coram non judice; the witnesses could not be examined, and the Court has proceeded without evidence. Whether in this respect the ecclesiastical court has proceeded regularly depends upon the construction of a statute, which is always for this Court: *Carter v. Crawley* (c).

As to the other point, it is inconsistent with usage, and 23 *Hen.* 8, c. 9, to cite out of the diocese in this case: *Burgoyne v. Free* (d), *Burder v. Veley* (e), and *Gawdarn v. Silby*, in the Court of Arches, 1777.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court:—This was a motion for a prohibition to the Court of Arches, in a suit for subtraction of church rate.

Two objections were urged. First, that the depositions were improperly taken with reference to the stat. 10 *Geo.* 4, c. 53, s. 9. The answer is clear, that, even if it were so, it is a matter of irregularity in practice only, and no ground for this Court to interfere by writ of prohibition.

Secondly, that the party was cited out of his diocese,

(a) 2 Salk. 549.

(b) 4 B. & C. 313; S. C. 6 D. & R. 373.

(c) Sir T. Raym. 497.

(d) 2 Addams, 405.

(e) See 9 Law J. (N. S.), Q. B. 267; S. C. 4 P. & D. not yet reported.

that a suit for subtraction of church rates cannot, by law civil or canon, be referred by letters of request to the superior ecclesiastical court, and so is not within the provision of the stat. 23 *Hen.* 8, c. 9. No authority was shown for this position, nor any reason assigned at the bar, why a suit for subtraction of church rate might not be so referred, as much as a suit for subtraction of tithes, or for any other contentious matter. But it was said by counsel that they were not aware of any instance in which it had been done. We have made inquiry, and find that suits for subtraction of church rate have frequently been referred by letters of request, and that no objection has been taken on that ground, although in several such cases a prohibition has been moved for on other grounds. The ground usually assigned in the letters of request is, that the parties can, in the superior court, have the benefit of counsel learned in the law, which advice cannot be had in inferior jurisdiction, and this ground is obviously inapplicable to the case in question. We see, therefore, no reason to doubt that the letters of request were in this case proper, and the rule must be discharged.

Rule discharged.



ACHAN, Assignee of SIMS, an Insolvent, v. THOMAS.

Wednesday,  
June 24th.

Debt on covenant. The second count of the declaration stated that on the 9th June, 1817, before the insolvency of the said Sims, by indenture between *B. B. Thomas*, T. H. Thomas defendant, of the first part, the said *Sims* of the second part and other persons of the third and fourth part, reciting that the said *Sims* had contracted for the purchase of an annuity of £1000 per annum, and that the parties of the first part had given a bond to the said *Sims* in the penalty of 3000*l.*, conditioned for the payment of the annuity for six years, by 3 & 4 *Will.* 4, c. 27, s. 42, as to the recovery of rent payable on the land.

Debt on covenant for payment of a rent-charge, as being an action of debt upon specialty, may be brought within twenty years, by 3 & 4 *Will.* 4, c. 42, s. 3, notwithstanding the

1840.  
JOLLY  
v.  
BAINES.



1840.  
  
 STRACHAN  
 v.  
 THOMAS.

ment of the annuity, and reciting that the parties of the first part were seised of certain lands in common, and had agreed, as a further and collateral security for the payment of the annuity, to execute to *Sims* the said indenture, the parties of the first part gave, granted and confirmed unto *Sims* an annuity or yearly rent-charge of 150*l.*, to be yearly issuing out of the lands mentioned in the indenture. And the parties of the first part, by the said indenture, jointly and severally covenanted with *Sims* that they would pay him the said annuity or rent-charge at the times therein mentioned. Breach, the non-payment, &c.

Plea, as to all arrears beyond six years, the limitation provided by 3 & 4 *Will.* 4, c. 27, s. 42.

Demurrer and joinder (*a*).

*W. H. Watson* in support of the demurrer (*b*). The question is, whether the limitation of six years under 3 & 4 *Will.* 4, c. 27, s. 42, or of twenty years under 3 & 4 *Will.* 4, c. 42, s. 3, applies to the present case; which is an action on a specialty to recover a rent-charge. The section of the former statute enacts, "that after the said 31st December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due," &c. The section of the latter statute enacts, "that all actions of debt for rent upon an indenture of demise, *all actions of covenant or debt* upon any bond or other specialty, &c. shall be

(*a*) The pleadings in this case (the pleadings being, as it were, reversed), also raised the same point as in the next case of *Sims v. Thomas*. In this case the plea shewed an assignment of the annuity to trustees, and the replication set up that such an assign-

ment was void against the plaintiff as assignee under the Insolvent Act, and on this part of the record the defendant had judgment.

(*b*) During the term (June 4th), before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, &c. within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after." By the very terms of the later statute, therefore, the present action, which is "debt upon a specialty," may be brought within twenty years; and, if the former statute fixes any other limitation, it is repealed. But the point was expressly decided in *Puget v. Foley* (a), where it was held that covenant for rent in arrear might be brought within the twenty years, and that it was not limited to the six years by 3 & 4 Will. 4, c. 27, s. 42.

1840.  
  
 STRACHAN  
 v.  
 THOMAS.

*Merivale* contrà. The subject-matter of the present action is clearly within c. 27. By the first section, which is the interpretation clause, *rent* extends "to all *annuities* and periodical sums of money *charged upon* or payable out of any *land*;" and by section 42, "no arrears of *rent* or of interest in respect of money charged upon or payable out of land, out of any land or rent &c. shall be recovered &c. but within six years." The limitation of six years, therefore, applies to this case. *Puget v. Foley* (a) is distinguishable: It was covenant for rent due on "an indenture of *demise*." Now such a case is expressly mentioned in the later statute &c., and *Tindal* C. J. was of opinion that the former statute did not apply to rent due on an indenture of demise, but only to rents which are a charge on land. But, even if the former statute did apply to rent due on an indenture of demise, it did so by comprehending it in general terms, whereas the later statute applied to it by name. Thus, in that case, according to the rule "that a later statute, general and affirmative, does not abrogate a former, which is particular," (*Com. Dig.* "Parliament," R.9,

(a) 2 Bing. N.C. 679.

1840.

STRACHAN  
v.  
THOMAS.

*Gregory's case* (a)), and the general rule for construction of statutes, noticed in the argument of counsel in *Rex v. Fauntleroy* (b), if the two statutes conflict, the latter statute, being particular with respect to rent due on an indenture of demise, must have prevailed. Here the converse is the case, for the former statute is particular with respect to the present subject, which is a charge upon land.

*W. H. Watson* in reply. The attempt to distinguish this case from *Paget v. Foley* (c) fails doubly; for the later statute, giving the limitation of twenty years, is particular with respect to this case also, which is "debt upon specialty," and the former statute, giving the six years only, was particular as to that case also, which was covenant for rent "payable out of land."

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court, and, after stating the pleadings as above and the sections of the two statutes, proceeded as follows:—The question is, whether upon the construction of these two acts of parliament the period of limitation for bringing the action is six years or twenty years. The plaintiff relied on the case of *Paget v. Foley* (c) as in point. The defendant contended that the circumstances of that case were different from the present, and, besides that, he contended, upon the general rule as to the construction of statutes in some measure apparently conflicting, that the statute of 3 & 4 Will. 4, c. 27, s. 42, giving a period of six years, must prevail; and not the statute of 3 & 4 Will. 4, c. 42, s. 3, giving a period of twenty years limitation.

We do not think it necessary to enter into the discussion on those points, because the Court of Common Pleas have in the before-mentioned case of *Paget v. Foley* (c) decided

(a) 6 Rep. 19, b.

(b) 2 Bing. 425.

(c) 2 Bing. N. C. 679.

that, if covenant be brought on an indenture of demise, the period of limitation is twenty years, and we entirely concur with the Court of Common Pleas in that decision. The present is not the usual case of reservation of rent upon a lease, and, so far, the rent is not properly due on an indenture of demise, it is a rent-charge, and, as such, falls within c. 27, s. 42. But notwithstanding that, we are of opinion that it falls within c. 42, s. 3, as being an action of debt upon a specialty.

We are, therefore, of opinion that the plea is bad, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

1840.

STRACHAN  
v.  
THOMAS.

SIMS, Administratrix, v. THOMAS.

Wednesday,  
June 24th.

**DEBT** on a bond, in the penal sum of 3000*l.* made by the defendant and two others to the intestate *James Sims*, as a security for payment of an annuity of 150*l.* by the defendant to the intestate. Breaches: the non-payment of 262*l.* 10*s.* due in the lifetime of the intestate, and of 2025*l.* due since his death.

A bond is not "goods" or "chattels" within 13 *Eliz.* c. 5, as to fraudulent alienations.

**Plea:** That the intestate *J. Sims*, on the 24th May, 1823, petitioned for his discharge under the Insolvent Act, 1 *Geo.* 4, c. 119, and, after assignment of his estate and effects under the act, obtained his discharge on the 1st September following, whereby the cause of action in the declaration mentioned, and all the right, title, and interest of *Sims* in the money claimed, were and still are vested in his assignee under the said act.

Where a party, after assigning an annuity bond to trustees for his wife and children, and in the event of the children dying without issue in trust for himself, his executors &c., became insolvent:—Held, the contingency in favour of the insolvent not having happened, that his assignee, under 1 *Geo.* 4, c. 119, had no beneficial interest in the bond, nor, consequently, any right of action on it.

**Replication:** That before any part of the said arrears claimed of the annuity became due, and before his petition to be discharged under the Insolvent Act, to wit, on the 30th June, 1820, *J. S.* the intestate, by indenture then made,

cial interest in the bond, nor, consequently, any right of action on it.

1840.

  
 SIMS  
 v.  
 THOMAS.

assigned over the said annuity and the said bond, and all benefit and advantage of the same, to certain persons, in the plea mentioned, to hold on the trusts declared of the same in the said indenture.

The rejoinder set forth the indenture, from which it appeared that the bond was assigned to the trustees, in trust for the wife, child, and grandchildren of *J. S.*, and in case such child and grandchildren should die under the age of twenty-one, without leaving issue, then in trust for him, *J. S.*, his executors, administrators, and assigns. Averment, that long before the making of the said indenture, *J. S.* was indebted to divers persons in divers large sums of money, amounting in the whole to a large sum, to wit, 3000*l.* which remained due from thenceforth until the discharge of *J. S.* under the Insolvent Act, and still remains unpaid. That the said indenture was executed without consideration, and to the end, intent and purpose to delay, hinder and defraud the said creditors of *J. S.* of their debts. Whereupon the said indenture, as against the assignee of *J. S.*, under the Insolvent Act, was and is void, frustrate, and of none effect.

Surrejoinder, that the said indenture was executed for consideration, and without the end, intent &c. in the rejoinder alleged.

Issue on this surrejoinder was found for the defendant, at the trial before Lord *Denman* C. J. at the Middlesex sittings after Michaelmas term 1838.

A rule nisi having been obtained for judgment non obstante veredicto, on the ground that the indenture was not void as against *Strachan*, the assignee of *J. S.* under the Insolvent Act,

*Merivale* shewed cause (a). The indenture of assignment having been made by *Sims*, when in insolvent circumstances,

(a) This case was argued during the term (June 3 and 4) before Lord *Denman* C. J. *Littledale*, *Patteson* and *Williams* Js.

was void against creditors, and is therefore void against the assignee under the Insolvent Act.

1. The property in the bond passed to such assignee by the assignment under the act then in force, 1 *Geo.* 4, c. 119. It may be said that no more could pass than the insolvent had at the time of the statutory assignment; that is the general rule, but there is an exception in cases of fraud: *Sims v. Simpson* (a). It was observed, on moving for this rule, that 1 *Geo.* 4, c. 119, contains no clause similar to 7 *Geo.* 4, c. 57, s. 32, for the avoidance of assignments by way of voluntary preference. But the 7 *Geo.* 4 relates entirely to one class of conveyances, namely, voluntary conveyances to *creditors*, by way of preference, which were not fraudulent within 13 *Eliz.* c. 5 (b), as, on the other hand, conveyances might be fraudulent within 13 *Eliz.* c. 5, which would not be bad as voluntary conveyances within 7 *Geo.* 4: *Twyne's case* (c) and *Cadogan v. Kennett* (d). The 7 *Geo.* 4, therefore, which has added to the former number of void conveyances by avoiding some conveyances that were not fraudulent within the 13 *Eliz.* does not touch the present point, which is, that this assignment is fraudulent within 13 *Eliz.*

2. This indenture is void against the insolvent assignee as the agent of the creditors. The assignee of an insolvent is a "party grieved" within 13 *Eliz.* c. 5: *Butcher v. Harrison* (e); and he would be entitled to the bond in question as part of the insolvent's assets: *Shears v. Rogers* (f).

3. The indenture is void against him as being himself always a creditor. By 1 *Geo.* 4, c. 119, s. 7, the provisional assignee is to assign to him "in trust for the benefit of such assignee or assignees and the rest of the creditors," and such assignee is treated throughout as a creditor. It is not necessary that he should have been a creditor at the time of

1840.  
  
*Sims*  
*v.*  
*Thomas.*

(a) 1 Bing. N. C. 306.

(d) Cowp. 432.

(b) 1 Smith's Leading Cases, 12,  
and the authorities there cited.

(e) 4 B. & Ad. 129; S. C. 1 N.  
& M. 677.

(c) 3 Rep. 80.

(f) 3 B. & Ad. 362.

1840.

SIMS

v.

THOMAS.

making the indenture: *Hungerford v. Earle* (a), *Tarback v. Marbury* (b), *Russel v. Hammond* (c), and *Richardson v. Smallwood* (d).

An additional reason for avoiding the indenture is, that it reserves a contingent beneficial interest to the insolvent himself, so that the assignee under the Insolvent Act might have derived benefit from it: per Lord *Alvanley* C. J. in *Carpenter v. Marnell* (e), *Carvalho v. Burn* (f), and *Burn v. Carvalho* (g).

It may be said that the defendant, as obligor of the bond, cannot set up the defence relied on. But the case is the same as the ordinary plea of a plaintiff's bankruptcy. Nor was it necessary that the rejoinder should aver that the assignee elected to treat the indenture as void. He could only manifest his election by bringing the action, so that the objection comes to this, that the rejoinder ought to have averred that the right of action had passed to the assignee, because he had brought his action.

Lastly, it may be said that the indenture was not void, because the bond assigned thereby is not "goods" or "chattels" within 13 *Eliz.* c. 5. But bills of exchange have been held "goods and chattels" within the Bankrupt Act of 1 *Jac.* 1, c. 15: *Hornblower v. Proud* (h); *Ex parte Vallance* (i) also, and other cases cited in *Humble v. Mitchell* (k) illustrate the same point.

*W. H. Watson* contra. This bond, being a chose in action, is not within 13 *Eliz.*, the object of which was to preserve from fraudulent alienation such things as might be available for the satisfaction of creditors: *Dundas v. Dutens* (l), *Gro-*

(a) 2 Vern. 261.

(b) 2 Vern. 510.

(c) 1 Atk. 13.

(d) Jac. 582.

(e) 3 B. &amp; P. 40.

(f) 4 B. &amp; Ad. 393; S. C. 1 N. &amp; M. 705.

(g) 1 A. &amp; E. 883; S. C. 4 N. &amp; M. 889.

(h) 2 B. &amp; Ald. 327.

(i) 3 M. &amp; Ayr. 224.

(k) 9 Law J. (N.S.) Q. B. 29;

S. C. 3 P. &amp; D. 141.

(l) 1 Ves. jun. 196.

*an v. Cooke* (a) and *Rider v. Kidder* (b). Copyholds, for the same reason, have been held not to be within the act: *Mathews v. Feaver* (c), which was not disputed in *Doe d. Gunstill v. Bottriell* (d), a case on 27 *Eliz.* c. 4. The remainder therefore, which seeks to avoid the indenture on the ground of its delaying creditors, is bad.

Assuming bonds to be within the statute, *Hawes v. Leader* (e) shews the transfer to be good against the executor or administrator of the assignor, and it will be good hereafter against the assignee under the Insolvent Act, to whom nothing passes but what the insolvent himself could pass: *Hepper v. Marshall* (f). By 1 *Geo.* 4, c. 119, s. 17, if the prisoner has been guilty of fraudulently dealing with his effects for the purpose of diminishing the sum to be divided among his creditors, or by way of fraudulent preference, the prisoner may be remanded; but the act contains no clause like sect. 32 of 7 *Geo.* 4, c. 57, which makes such dealing void. In *Butcher v. Harrison* (g) it seems to have been taken, without sufficient consideration, that the assignee is a "party grieved," within 13 *Eliz.* c. 5. He is not necessarily so, for he is not always a creditor. By 1 *Geo.* 4, c. 119, s. 7, he is to be "a proper person," and this remainder does not state that he was a creditor. The contingency of beneficial interest in the bond would not give the assignee under the act any property in it until the contingency happened.

But, at all events, the obligor of the bond cannot set up this defence without shewing that the assignee or the creditors claim. A deed of this sort is avoided in equity no further than to the extent claimed by a creditor who applies, and then the Court will not act unless in the specific claim of a creditor: *Colman v. Croker* (h). So also in *Shears v. Rogers* (i),

1840.  
  
 SIMS  
 v.  
 THOMAS.

(a) 2 Ball & B. 230.

(b) 10 Ves. 360—368.

(c) 1 Cox C. C. 278.

(d) 5 B. & Ad. 131; S. C. 2 N. & M. 64.

(e) Cro. Jac. 270; S. C. Yel. 196.

(f) 2 Bing. 372,

(g) 4 B. & Ad. 129; S. C. 1 N. & M. 677.

(h) 1 Ves. jun. 160.

(i) 3 B. & Ad. 370.



1840.  
  
 SIMS  
 v.  
 THOMAS.

*Littledale J.* observes, "the assignment was void as soon as the creditors claimed to treat it as such, though not until then." And *Taunton J.* "by the words of the statute 13 *Elix.* c. 5, s. 2, a conveyance within its scope is altogether void at law; and a creditor who elects to treat it as void need not have recourse to a Court of Equity." The cases under the Bankrupt Act shewing that, if the assignees do not claim, the bankrupt has a right against all others, support this view, and *Drayton v. Dale* (a) shews that the defendant should have stated that the creditors had claimed.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court, and, after stating the pleadings, proceeded thus:—Before we consider the effect of the rejoinder it will be necessary to see whether there be any defect on either side in the previous pleadings. The plea states that the plaintiff was discharged under the Insolvent Act of the 1 *Geo.* 4, c. 119, and that all his real and personal estate, and the cause of action mentioned in the declaration and the right and interest of *Sims* under the same, became vested in *Robert Sruchan*, his assignee under the Insolvent Debtors' Act. This plea is a sufficient answer to the declaration, for the fourth section of the act directs the insolvent to make a conveyance of all his real and personal estate to the provisional assignee, so as to vest all such real and personal estate in such provisional assignee, subject to a proviso which does not apply to this question, and then the seventh section directs the provisional assignee to assign the real and personal property so vested in him to the full assignee, if we may use the term, and such assignee is, by the same seventh section, empowered to sue in his own name for the recovery, obtaining, and enforcing any estate, effects, or rights of the insolvent.

The replication to this shews that by the indenture above

(a) 2 B. & C. 293; S. C. 3 D. & R. 534.

stated *Sims* had, before his discharge under the Insolvent Act, assigned his interest in this bond to the trustees therein mentioned for the benefit of his wife and family, and that, therefore, he had no longer any beneficial interest in it; and, as the Insolvent Act above stated directs that the estate and effects of the insolvent shall be assigned to the assignee, in trust for the benefit of the assignee and the rest of the creditors, if no benefit can arise to the creditors from the bond in question, on account of all the beneficial interest in it having been already disposed of, that bond cannot be the subject of assignment under this Insolvent Act; and that, therefore, the assignee could not sue in his own name for the recovery of the money under the bond. This replication then, we are of opinion, contains a sufficient answer to the plea.

The rejoinder then craves oyer of the deed, stated in the replication, for assigning the bond, and that deed is set out, and by that it appears that the bond was assigned to the trustees to make a provision for the wife and family of *Sims*, and that the interest in the bond was wholly taken out of *Sims* from the time of the assignment, except that in the contingency of the death of his wife and children and grandchildren there was a resulting trust to *Sims* himself. The rejoinder then states that before making the indenture of assignment *Sims* was indebted to divers persons in divers large sums of money, to wit, sums amounting to 3000*l.*, which remained due and unpaid from thence until and at the time of his discharge under the Insolvent Act, and which remains still unpaid; and then the rejoinder further states that the indenture of assignment was made and executed without consideration, and to the end, intent, and purpose to delay, hinder, and defraud the said creditors of the said *Sims* of their just and lawful debts, wherefore the said indenture of assignment, as against the said *Robert Strachan*, the assignee of the insolvent, was and is void, frustrate, and of none effect.

Now if this indenture of assignment be void and of none

1840.  
  
*Sims*  
*v.*  
*Thomas.*

1840.

~~~~~  
 SIMS  
 v.  
 THOMAS.

effect, as against *Strachan*, the assignee of the insolvent *Sims*, the replication falls to the ground, and the plea is therefore set up, and the defendant would be entitled to judgment.

The surrejoinder alleges that the indenture of assignment was executed for consideration, and without the end, intent, or purpose to delay, hinder, or defraud any creditors of *Sims* of their just and lawful debts. Issue is joined upon this surrejoinder, and that issue is found for the defendant, thereby affirming the rejoinder as far as the issue in fact to the fraud is concerned.

Several objections were made to the rejoinder, but we do not think it necessary to consider the whole of them, as we think there is one question which will decide the validity of it, and that is, whether the bond and grant of an annuity stated in the pleadings are goods and chattels within the meaning of the statute 13 *Eliz.* c. 5. If they are not goods and chattels in the meaning of that act of parliament, this indenture of assignment cannot be void as against creditors by the operation of that act; and, if it be not void under the act, there is nothing else to make it void against creditors. It is not void against *Sims* himself, and there is no provision in the 1 *Geo.* 4, c. 119, which was the Insolvent Act in question at the time of the indenture of assignment, to make it void as against creditors. Any provisions made under other subsequent Insolvent Acts (even if they applied to a case similarly circumstanced) could not affect the case; and it is not a question whether it would be void under the bankrupt laws, as this is only a question whether it be void as against the assignee and creditors under this Insolvent Act.

There are a great many cases as to what the words *goods and chattels* include, and some of them turn upon somewhat refined distinctions, but it is not necessary now to consider whether those words, without further explanation and statement of the circumstances attending them, would pass

bonds or not. The question is, whether they are *goods and chattels* within the meaning of 13 *Eliz.*

1840.  
  
 SIMS  
 v.  
 THOMAS.

In *Mathews v. Feather* (a), where a question arose as to the assignment of copyhold premises, the Master of the Rolls, Sir *Lloyd Kenyon*, afterwards Lord *Kenyon*, says, "I am not satisfied as to the nature or value of the copyhold premises, which, generally speaking, are not subject to debts, and therefore the assignment of them can never be fraudulent against creditors." In *Dundas v. Dutens* (b), which arose on an assignment of stock, the Lord Chancellor Lord *Thurlow* says, "Is there any case where a man having stock in his own name has been sued for the purpose of having it applied to satisfy creditors? Those things, such as stock, debts, &c., being choses in action, are not liable; they could not be taken upon a *levari facias*." In *Ridder v. Kidder* (c), which was a case of transfer of stock, the Lord Chancellor Lord *Eldon* appears to have been of opinion, that stock was not within the statute of *Elizabeth*, and assents to the opinion of Lord *Thurlow* in *Dundas v. Dutens* (b); though, under the peculiar circumstances of the case, he afterwards appears to have allowed the transfer to be made. We therefore think that it is only such things as may be taken in execution that are affected by the statute of *Elizabeth*. Bonds indeed are now liable to be taken in execution, but they were not so at the time of the making the indenture of assignment.

Considering then that we are of opinion that the statute of *Eliz. c. 5*, only extends to the assignment of such effects as are liable to be taken in execution, the greater part of the argument taken on the part of the defendant falls to the ground, and it is only material to consider one of the points, *viz.* that it is urged that, inasmuch as it appears on the face of the indenture of assignment that there was a contingent interest in *Sims*, the insolvent, in the bond and grant of the annuity, as it appears on the deed of assignment, and that

(a) Cox's Cases in Chancery,  
 178.

(b) 1 Ves. jun. 196.

(c) 10 Ves. 360.

1840.

  
**SIMS**  
*v.*  
**THOMAS.**

it would revert and become vested in him on the death of his wife and children and grandchildren, therefore the assignee of *Sims*, the insolvent, takes something, and that in that respect the assignee has some beneficial interest as well as the legal interest. The assignee has certainly a contingent beneficial interest, and, when that comes to be vested, he will be the proper person to sue, but he has no beneficial interest till that event arises, and, as he has none in the meantime, and as nothing passes to the assignee, unless he has a beneficial interest, he has no right of action and cannot sue for the arrears of the annuity while his interest is merely contingent. The contingent interest here is very remote, but that makes no difference; it must be judged of in the same way as if the interest of *Sims* had depended upon a single life, or had even been certain as depending on a term for years certain. Upon the whole of this case we are of opinion that the rule must be made absolute to enter judgment for the plaintiff, notwithstanding the verdict found for the defendant.

Judgment for the plaintiff.



*Tuesday,*  
*June 23rd.*

**TAYLOR v. HENNIKER, Bart.**


An action on the case lies for distraining for more rent than is due, although the distress taken is not sufficient to pay the rent due.

Such an action lies, although a notice of distress for more rent than is due is withdrawn, and the distress is sold under a second notice of distress for the rent really due.

**CASE** for excessive distress. The declaration stated that the plaintiff at the time when &c. held certain premises as tenant to the defendant at a certain rent; that the defendant, contriving and maliciously intending to injure the plaintiff, on the 11th August, 1838, falsely and maliciously pretending that 165*l.* &c. was in arrear from the plaintiff to the defendant for rent of the said premises, wrongfully and unjustly seized grass of the plaintiff, growing upon the premises, of the value of 300*l.*, as a distress for the sum so

the defendant for rent of the said premises, wrongfully and unjustly seized grass of the plaintiff, growing upon the premises, of the value of 300*l.*, as a distress for the sum so

pretended to be in arrear; and, under that pretence, afterwards, to wit, on &c., cut and sold the said grass towards payment of the said pretended arrears. Whereas, in truth, at the time of the said distress, 40*l.* only, of the sum so pretended to be in arrear, was in arrear &c. Plea, general issue by statute.

1840  
  
 TAYLOR  
 v.  
 HENNIKER.

At the trial before *Littledale* J. at the Essex spring assizes, 1839, the plaintiff proved that the rent in arrear was only 80*l.*, and that the defendant had distrained the grass, as alleged, and given a notice of distress for 165*l.* odd, and had subsequently given a second notice, which, reciting the former, then stated that the grass was distrained for 80*l.* only. The grass was cut and sold under the *latter* notice, and did not realise enough to satisfy the sum due.

Verdict for the plaintiff for nominal damages, with leave to move for a nonsuit on the ground that no damage had been sustained.

*Platt*, in the Easter term following, having obtained a rule nisi, on the authority of *Wilkinson v. Terry* (a),

*Thesiger* and *Petersdorff* now shewed cause (b). The defendant, by the original excessive distress, inflicted a legal injury on the plaintiff, which entitles him to maintain this action. Actions are often maintainable although no actual damage has been sustained, as for irregularity in a distress, where goods are appraised by persons not sworn until after the appraisement: *Kenney v. May* (c); or for non-payment by a banker of a customer's cheque: *Marzetti v. Williams* (d); or for imitating a chattel made for sale: *Blofeld v. Payne* (e). Nor is it necessary to prove that an excessive distress was taken maliciously: *Field v. Mitchell* (f). The

(a) 1 M. & Rob. 377.

(d) 1 B. & Ad. 415.

(b) Before Lord Denman C. J.,  
*Littledale, Patteson and Williams*  
 Js.

(e) 4 B. & Ad. 410; S. C. 1 N.  
 & M. 353.

(f) 6 Esp. 71.

(c) 1 M. & Rob. 56.

1840.

  
 TAYLOR  
 v.  
 HENNIKER.

distress must be reasonable by the statute of Marlbridge (52 Hen. 3, c. 4). The withdrawal of the first distress is no answer, any more than is the re-delivery of a chattel after conversion (*Countess of Rutland's case (a)*), or the discharge of a person arrested for more than is due. But it is easy to conceive that, whatever the value of the goods distrained might ultimately turn out to be, a party would be practically injured by notice of distress for more rent than he owed, as he might, in consequence of the excess, be unable to get sureties for a replevin bond, or be driven to bring an action, lest the amount of the distress should be evidence against him of his holding at more than his actual rent. The opinion of Parke B. in *Wilkinson v. Terry (b)* is inconsistent with principle and was never reviewed, because the plaintiff had substantial damages on the second count of the declaration for not selling for the best price.

*Platt* contra. In this case the plaintiff has sustained neither damages nor an injury. Where a party is arrested for more than is due, there is an actual restraint of liberty under the excessive claim. But here nothing was *done* under the first notice, nor has there been any invasion of a right, as in some of the cases cited. The 11 Geo. 2, c. 19, s. 19, which gives the right of action in this case, is decisive to shew that the action will not lie, unless there has been actual damage, for, after providing that irregularity in the distress shall not make it unlawful, where rent is due, it allows the party to "recover full satisfaction for the *special damage*." This declaration evidently treats the sale as if made under the first notice, whereas it was under the second. [*Patteson J.* referred to *Avenell v. Croker (c)*, where part of the rent was distrained for before it was due.]

*Cur. adv. vult.*

(a) Rol. Abr. Action sur Case  
(Trover L).

(b) 1 M. & Rob. 377.  
(c) 1 M. & M. 172.

1840.

TAYLOR  
v.  
HENNIKER.

Lord DENMAN C. J., on the following day delivered the judgment of the Court.—This is not an action founded on the statute 11 *Geo. 2*, c. 19, s. 19. That section applies only where the distress is lawful in its inception, but some irregularity is committed in conducting it, which would have rendered the party a trespasser by relation at common law; and now, by the operation of that statute, he is not to be so considered, but the tenant is to recover the special damage sustained by the irregularity and no more. Here the distress was unlawful in its inception, being for more than was due; the action is at common law, and the selling under the distress is no necessary part of the cause of action; it is aggravation only. The action would have lain before the statute of *W. & M.*, which introduced the sale of goods distrained. The relinquishment of the excessive sum distrained for by notice to the tenant does not cure the wrong any more than the return of an article converted cures the conversion.

We should, therefore, have considered the plaintiff as clearly entitled to a verdict for nominal damages, but that we paused in consequence of the two *nisi prius* cases: *Avenell v. Croker* (a), and *Wilkinson v. Terry* (b). Now the first of those cases proceeds on the ground that, as only one thing was taken, and that must have been equally taken, if the right sum had been distrained for, no damage accrued, and therefore the plaintiff had no cause of action. The same reasoning applies, though many things be taken, if their value be less than the rent really due, and for which the distress ought to have been. The verdict was for the defendant; a motion for a new trial was made on another ground, and the parties agreed to a *stet processus*, but the ruling of Lord Tenterden on the above point was not questioned. In the latter case, Parke B. doubted as to the action being maintainable, but a verdict was taken for nominal damages.

With all possible respect for the opinion of those learned

(a) 1 M. &amp; M. 172.

(b) 1 M. &amp; Rob. 377.



1840.  
 TAYLOR  
 v.  
 HENNIKER.

judges, we cannot agree to the doctrine contained in those cases. It is true that in replevin a landlord may avow for less rent than he has distrained for, but there the plaintiff complains of the taking altogether, and not of the excess. Here he complains of the excess, and that excess really took place; there was a wrongful act of the defendant, and though, by reason of the value of the goods taken falling short of that of the actual rent due, no real damage was sustained; yet there was a legal damage, and cause of action, for which the plaintiff was entitled to a verdict. This rule must therefore be discharged.

Rule discharged.

SOUTH-EASTERN RAILWAY COMPANY v. HEDBLEWHITE.

Same v. HAMER.

Same v. BANNER.

Same v. WRIGHT.

Wednesday,  
 June 24th.

By a railway act a company were allowed, in debt for calls, to declare generally that the defendant, being

the proprietor of a share, was indebted to the company in such a sum as the calls should amount to, whereby an action had accrued, without setting forth the special matter; and it was also provided that at the trial of such an action it should only be necessary to prove that the defendant, at the time of making such calls, was the proprietor of a share, and that such calls were in fact made, and that such notice was given as directed by the act, without proving the appointment of the directors who made such calls, or any other matter whatsoever.

The Court in their discretion under the statute of *Anne*, out of the following pleas in several cases, allowed the first three only.

1. Nunquam indebitatus.
2. That defendant was not a proprietor.
3. That the shares were forfeited.
4. That at the meetings at which the calls were made there was not present a competent number of directors who had paid up previous calls.
5. That no notice had been given of the calls (as required by the act).
6. That no time or place for payment of the calls had been appointed (as required by the act).
7. That the calls were not made for the purposes of the undertaking.
8. That the calls were not made upon all the shareholders (as required by the act).
9. That the calls were not made by competent persons.

in a general form, as authorised by the company's act, the 6 & 7 Will. 4, c. lxxv., intituled "An Act for making a Railway from the London and Croydon Railway to Dover, to be called the South-Eastern Railway."

The declaration in each case stated that the defendant, being a proprietor of a certain number of shares in the company, was indebted to the plaintiffs in the sum of, &c. for a call of the sum of, &c. upon each of his shares, and in the further sum of &c. for interest for the forbearance of the monies owing in respect of his shares, whereby an action had accrued &c.

The pleas which had been allowed were, in the two first cases,

1. Never indebted.
2. That defendant was not a proprietor modo et formâ.
3. That there were not present at the respective meetings, at which the calls were made, four directors who had paid up previous calls made in respect of their shares.

In the third case—

1. That the call was not made upon all the subscribers and shareholders, &c.
2. That the call was not duly made by competent persons, and for the sole purpose of the undertaking.
3. That due notice was not given of the call.
4. Never indebted, to the count for interest.

In *Wright's* case—

1. Never indebted.
2. That the interest claimed was in respect of the calls, and that there was no notice of such call.
3. That the interest claimed was in respect of calls, and that the directors did not appoint a time and place for a person to receive the payments.

4. That the interest claimed was in respect of calls which were not made for the purposes of the undertaking.

5. That the interest claimed was in respect of the calls, and that the shares were declared to be forfeited by the directors, and that the defendant acquiesced in such forfeiture.

1840.

The SOUTH-  
EASTERN  
RAILWAY  
COMPANY

v.

HEBBLEWHITE  
and others.

1840.

**The SOUTH-  
EASTERN  
RAILWAY  
COMPANY**

v.

**HEBBLEWHITE  
and others.**

In support of the several rules it was deposed that the third plea in the first and second cases, the first plea in the third case, and the second, third, fourth, and fifth pleas in the last case, were pleaded for the sake of delay (a).

(a) Sect. 113 of the company's act enacts, that the shareholders are to pay the sums to be paid in respect of their shares, in such parts or proportions thereof as shall from time to time be called for by the directors of the said company under and by virtue of the powers of this act, at such times and at such places, and to such person as shall be directed by the said directors; and in case any party shall refuse or neglect to pay, &c. it shall be lawful for the company to sue for and recover the same in any Court of law or equity, together with interest on such unpaid sum of money.

Sect. 115 enacts, that the directors to be appointed as aforesaid shall have power from time to time to make such calls of money from the subscribers to, and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls or money paid for and in respect of any such shares shall not amount to more than the sum of 50*l.* on any such share, so that no such call shall exceed the sum of 5*l.* upon each share, which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that the total amount of such calls in any one year shall not exceed 30*l.* upon each share; and an interval of two calendar months, at the least,

shall elapse between the day appointed for the payment of one call and the day appointed for the payment of another call; and twenty-one days' notice, at the least, shall be given of every such call by advertisement, &c.; and all monies so called for shall be paid to such person, at such times and places, and in such manner as in the said notice shall be appointed; and the respective owners of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid to such persons, and at such times and places, and in such manner as shall be appointed as aforesaid, and if any owner or proprietor for the time being of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of 5*l.* per cent. &c. from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest, if any, then or at any time thereafter it shall be lawful for the said company to sue for and recover the same in any of his Majesty's courts of record by action of debt or on the case, or by bill, suit, or information, or the said directors may and they are hereby authorized to

ing showed cause (a) in the three first cases and me in the last. The Company will rely mainly on the section of their act, which gives them the germ of declaration, and provides that it shall only be necessary for them to prove that the defendant was a proprietor of a share in the undertaking at the time of the call, and that such notice

1840.

**The SOUTH-  
EASTERN  
RAILWAY  
COMPANY**

**v.**

**HEBBLEWHITE  
and others.**

shares belonging to such be forfeited, and to order to be sold. Provided, that no advantage be taken of any forfeiture of shares in the said undertaking in writing, under the signature of two directors, or under the signature of a secretary, or clerk, of the said company, that such notice has been declared forfeited, and that such notice

17 enacts, that in any action brought by the said company against any proprietor for the recovery of any money payable for or in respect of shares in the said company, it shall be sufficient evidence that the defendant, being proprietor of a share in the undertaking, is indebted to the said company in such sum of money as the calls in arrear shall be for a call, or so many such sums of money upon shares belonging to the said defendant, whereby an action hath been brought against the said company by this act, without setting up any special matter; and on the issue in such action it shall only be necessary to prove that the defendant, at the time of making the call, was a proprietor of a share in the said undertaking, and

that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest &c. unless it shall appear that any such call exceeded 5*l.* per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required, or that calls amounting to more than twenty in the whole, had been made in some one year; and in order to prove that the defendant was proprietor of such share in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors, from time to time, of shares in the said undertaking, with the number of shares respectively entitled to &c., shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein.

(a) During the term (June 8) before Lord Denman C. J., *Little-  
dale, Paterson, and Williams* Js.

1840.

The SOUTH-  
EASTERN  
RAILWAY  
COMPANY  
v.  
HEBBLEWHITE  
and others.

was given as is directed by the act, without proving the appointment of directors. But this can mean no more than that the Company shall be considered to make out a *prima facie* case by the proof mentioned, not that such *prima facie* case may not be answered by evidence on the part of the defendant that the plaintiffs have not complied with the conditions precedent, on which their title to sue must be founded. Pleas, therefore, setting up such answers must be allowed, unless they contain matters of defence, which would be admissible under *nunquam indebitatus*; and, to instance only the plea, that there was no notice of call, and that the call was made for purposes unconnected with the undertaking, the defences contained in these pleas could not, consistently with the rules of pleading, be admissible under *nunquam indebitatus*, for the declaration contains no allegation as to notice and many other matters which are essential to the Company's title. The act is to be construed reasonably and be understood as pointing out what shall be proof of certain matters, when they are *in issue*, and not to direct that certain proof must always be given in all cases, even if the only plea were payment, and that in no case shall any further proof be required. *The London and Brighton Railway Company v. Wilson* (a) and *Same v. Fairclough* (b) are against this view, but they require to be reconsidered, and are not in accordance with the later case of *The Edinburgh Railway Company v. Hebblewhite* (c), where the Court of Exchequer appear to have thought that a similar clause merely enabled the Company to set up a *prima facie* case, and, indeed, on special demurrer, discussed the question whether the plea of no notice of calls ought to conclude with a verification or to the country.

It is not stated that the pleas are false, and the defendants are not now bound to contend that the pleas are good, but merely that they are not palpably bad.

(a) 6 Bing. N. C. 135.

(c) 6 M. &amp; W. 707.

(b) 6 Bing. N. C. 270.

Sir *W. W. Follett* and *W. J. Alexander* contra. The object of the clause in question, to which all the shareholders must be taken to be parties, was to facilitate the recovery of money due for calls, and that object will be defeated if in every action like the present it is open to the defendant to call upon the Company to prove that every step in their proceedings is free from irregularity. *The London and Brighton Railway Company v. Wilson*(a) is an express authority against the allowance of these pleas. It is not denied that they are pleaded for delay.

1840.  
  
 The SOUTH-  
 EASTERN  
 RAILWAY  
 COMPANY  
 v.  
 HEBBLEWHITE  
 and others.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—It is not necessary in these cases to determine whether the defences sought to be pleaded can or cannot be given in evidence under the plea of *nunquam indebitatus*. It is sufficient to say that we consider most of them to be quite contrary to the provisions of the act of parliament under which the actions are brought, and that, in the exercise of our discretion under the statute of *Anne*, we shall be governed by the same views which the Court of Common Pleas adopted in the two cases cited, *London and Brighton Railway Company v. Wilson*(a) and *Same v. Fairclough*(b). The only pleas which we think ought to be allowed, amongst those sought to be pleaded, are

1. *Nunquam indebitatus*.
2. That the defendant was not proprietor.
3. That the directors have exercised their option of declaring the shares of the defendant to be forfeited, and have taken the steps thereon directed by the act.

The rule must be made absolute to strike out the other pleas.

Rule absolute.

(a) 6 Bing. N. C. 135.

(b) 6 Bing. N. C. 270.



1840.

Wednesday,  
June 24th.

The QUEEN v. The President and Chapter of the  
Cathedral Church of ST. PETER'S, EXETER.

The deanery of Exeter was founded and endowed by the bishop of that see in 1225; the dean to be elected freely by the chapter from among the prebendaries. For more than 300 years from the foundation the course pursued at the election of dean was for the bishop to issue his license to the chapter to elect, for the chapter to elect and present to the bishop, and for the bishop to confirm.

*Elizabeth* issued letters recommendatory, on a

vacancy occurring in 1559, and the person recommended by her was elected by the chapter, and all the formalities of previous elections were observed. *Charles 2*, and succeeding monarchs down to 1839, granted the deanery as it became vacant by letters patent and as of full right, but the same formalities were always observed, the bishop issuing his license, the chapter electing, and then the bishop confirming.

In 1839 the crown issued letters patent granting the deanery, to which the chapter paid no attention. The crown afterwards issued letters recommendatory in favour of the same person who was grantee under the letters patent, but the chapter elected another person.

A rule for a mandamus to elect the person recommended by the crown was discharged, on the grounds, that the crown had not the right, which it appeared to claim, of recommending a person whom the chapter would be bound to elect, so that the election of any other would be void; and that, on the other hand, if the deanery were donative in the crown, it would pass by letters patent, and the person elected by the chapter be a mere trespasser; that, if it were in the presentation of the crown as patron, or the crown had a right to nominate a person to the chapter to be by them presented to the bishop for institution, the proper remedy was quare impedit.

**SIR J. CAMPBELL** A.G. in Easter term last obtained a rule calling upon the president and chapter of the said cathedral church to shew cause why a writ of mandamus should not issue, directed to them commanding them to proceed to the election and admission of *Thomas Grylls*, clerk, one of the prebendaries of the said cathedral church, to be dean of the said church, and, if necessary for that purpose, to elect, collate, and admit him to be a canon residentiary of the said cathedral church, and to do all things requisite and competent to be done by them on their part, for the purpose of his being so elected and admitted dean of the said church, upon notice of this rule, to be given to the Bishop of Exeter, and to the said president and chapter, or some of them, and to their chapter clerk in the meantime.

The rule was obtained upon two affidavits, the one made by the said *Mr. Grylls*, and the other by *Mr. Bouchier*, assistant solicitor to the Treasury.

*Mr. Grylls* stated that, by a certain charter of foundation or grant made by the chapter of the said cathedral church, on or about the 30th November, 1225, the said chapter,


with the consent of the then Bishop of Exeter, granted (among other things) that, in the said cathedral church, from thenceforth, one of the canons should be elected by and out of the said chapter to be dean, and should formally be instituted such dean, and that the said bishop, for the sustentation of the said deanery, endowed the same by annexing thereto the churches of Branton and Tanton for ever. That the first dean of the said church was elected by the said chapter, and such election was confirmed by the then Bishop of Exeter, and that by the said charter of confirmation the said bishop thereafter, for himself and his successors, bishops of Exeter, granted the said chapter for ever free power to choose for dean of the said church such fit person as should be canon in the said cathedral church, subject to the confirmation of the said bishop and his successors. That a similar form of election and confirmation, with the exception of the case of *James Haddon*, about the year 1558, who was nominated by letters patent of *Edw. 6* to the said deanery, but which nomination was not finally carried into effect in consequence of the death of the said king, and except that in most instances the bishop's license preceded the election, appears, so far as may be collected from the entries and records of the time, to have been followed until about 1559. That about the 16th December, 1559, Queen *Elizabeth*, by letters patent under the royal signet, addressed to the president and chapter of the church, reciting that the deanery was vacant by the death of *Dr. Reynolds*, recommended unto them, for the place of dean, *Gregory Dodds*, and required the said chapter in their election of the next dean to have consideration of him accordingly. That the president and chapter, in answer, signified to her majesty that by the foundation of the deanery it was required that, before they proceeded to the election, they ought not only to have the license of the bishop for the time being, who was the founder and patron of that dignity in the said church, but also were bound to elect one that was a canon and prebendary of the said church, and they besought her

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.



1840.

  
The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

majesty that the said *Dodds* might by her majesty's royal authority, for the discharge of their conscience, be qualified or dispensed with for the premises. That about the 7th February, 1559 (a), *Dodds* was installed into a prebend of the said church on the mandate of the Archbishop of Canterbury, founded on the said presentation or recommendation of her majesty, the see of Exeter being at that time vacant, and the said archbishop having the custody of the temporalities thereof, and that on or about the 10th of the same month *Dodds* was duly elected according to usual forms to be dean of the said church, and that such election was afterwards confirmed by the said archbishop, and *Dodds* was installed as such dean. That the records or entries of the election and admission of the several deans of the church next in succession and up to the year 1629, were, as deponent believed, wanting. That about the 7th July, 1629, the deanery then being vacant, one *William Peterson*, then being a canon residentiary of the church, was, by letters under the royal signet of *Charles 1*, addressed to the chapter and canons of the church, recommended to be dean thereof, and the chapter and canons were required in due order and with convenient speed accordingly to elect him dean and admit him, and that *Peterson* was, in pursuance of the said letters recommendatory, in form elected, admitted, and installed dean of the church. That about the 14th December, 1661, the deanery being then vacant by the death of the said *Peterson*, one *Seth Ward* was, by letters patent under the royal signet of *Charles 2*, addressed to the then Bishop of Exeter and to the chapter of the said church, reciting the said vacancy, and that the said office and dignity appertained to his majesty's disposition, appointed by his majesty for supply thereof, and the president and chapter of the church were required by the said letters to proceed forthwith to the election and to admit *Ward* to be dean thereof, and the bishop and chapter were required to perform and put in execution all other things which appertained to them jointly and severally for the making up

(a) Sic.

and perfecting his majesty's determination; and that, in pursuance of the said last mentioned royal letter, and of a letter addressed by the then bishop of Exeter to the chapter, inclosing the said royal letter and requiring them to proceed to the election of *Ward*, *Ward* was duly elected and admitted and installed dean of the church.


That from the time of the last-mentioned election, admission, and installation, to the present time, upon occasion of every vacancy of the said deanery, the several deans of the church successively elected, admitted and installed, with the exception of the Rev. *Thomas Hill Lowe* hereinafter mentioned, *have been nominated and recommended by letters mandatory or recommendatory*, similar to those hereinbefore set forth, or *by letters patent* under the great seal of the successive kings and queens of England, in whose respective reigns such vacancies occurred, and have been elected by the great chapter of the whole body, and admitted and installed deans of the church, after and in pursuance of such letters mandatory or recommendatory, or letters patent, and not otherwise; and that during the time last aforesaid there have been seventeen vacancies, and, in those, ten instances have occurred where the person so nominated and recommended to be dean as aforesaid was not at that time a prebendary or *canon residentiary of the said church*, and that in every such instance the person so nominated and recommended has, in obedience to and in furtherance of such recommendation and nomination, been first collated to the canonry or prebend before held by the preceding dean, and installed into the same, and afterwards elected and admitted a residentiary, and, after that, elected by the said great chapter, and admitted and installed dean.

That the deanery of the said church having become vacant by the death of *Whittington Landon*, late dean thereof, her present majesty, about the 1st April, 1839, caused letters patent under her majesty's privy seal to be issued, whereby she gave and granted to the deponent the deanery of the said church, and commanded, enjoined, and

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

1840.

  
The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

required the chapter and canons of the said church, or any others whomsoever having sufficient power in that behalf, rightfully and lawfully to admit deponent to the deanery. That the chapter and canons refused to elect deponent, alleging that, although he was a prebendary of the said church, nevertheless, forasmuch as he was not a canon residentiary thereof, he was not eligible to the said deanery, and that by 1 & 2 *Vict.* c. 108, intituled, "An Act for suspending until the 1st Aug. 1839, and to the end of the then Session of Parliament, the appointment to certain Dignities and Offices in Cathedral and Collegiate Churches and to Sinecure Rectories," the said chapter and canons were prevented from electing deponent to be a canon residentiary of the said church, in order to make him eligible to the deanery of the church. That by the 2 & 3 *Vict.* c. 14, intituled "An Act for removing Doubts as to the Appointment of a Dean of Exeter, or of any other Cathedral Church," it was enacted that nothing in the last-mentioned act should, during the vacancy of the deanery of any church, prevent any spiritual person from being collated, elected, or appointed to the prebend, or to the canonry in such church, held by the last dean thereof, for the purpose of qualifying such person to be appointed or elected dean thereof. That after the passing of the said last-mentioned act, viz. about the 12th June, 1839, her majesty, by a certain letter recommendatory, under her royal sign manual, addressed to the president and chapter of the church, especially recommended unto the said president this deponent to be preferred to the place of dean, requiring and commanding the president and chapter to assemble themselves with all convenient speed and in due order to elect this deponent dean of the church. That the president and chapter refused &c., and about the 27th of the same month proceeded to elect the said *T. H. Lowe* to be dean of the church; and, afterwards, on the 1st August following *Lowe* was presented by the chapter to the bishop of Exeter, as having been elected dean, and for confirmation of the bishop, and the bishop did thereupon confirm the election, and *Lowe* then and there took the

usual oaths as dean, and on the 2d of August was installed such dean, and on the Sunday following read in.

In opposition to the rule an affidavit was made by Mr. *Ralph Barnes*, chapter clerk to the dean and chapter, and deputy registrar of the diocese of Exeter. His affidavit stated that the see of Exeter was established about the year 1050, and the chapter at the same time founded of twenty-four canons, the bishop having the collation to all the canonries. That the deanery was first founded in 1225 by *William Brewer*, Bishop of Exeter, with the consent of the chapter. That by the charter of erection of the deanery, it appears that the dean was to be for ever freely elected by the chapter and out of the chapter, and to be presented to the bishop for his confirmation of the election and for institution thereupon. That in all the records of succession to the deanery down to the year 1553, it appears that the bishop has issued his license to the chapter to elect, that the chapter have thereupon proceeded to an election, and that after the election of one of the canons of the church to be dean, and after the assent of the dean elect given thereto, the bishop has proceeded to the confirmation of the election judicially according to canonical forms, and that in none of the records of the said elections is there any reference to the exercise of royal authority. That in regard to the case of *Haddon* in 1559, mentioned in the affidavit of Mr. *Grylls*, deponent found in the chapter act books, in the margin of the entry referring to the letters patent of *Edward 3*, in the said affidavit mentioned, a note, in a handwriting coeval and in which acts and entries in the same book are written, in the following terms, “decanatus Exon. non est de collatione aut presentatione domini regis, sed spectat ad provisionem sive electionem capituli, licentiâ episcopi, qui est fundator et patronus decanatus, prius obtentâ.”

That by the customs and statutes of the said church nine of the canons are elected and admitted to be residentiaries by the residentiaries, and are called canons residentiary, and the rest of the canons not residentiary are usually

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

1840.

THE QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

styled prebendaries, and the residentiaries exclusively have the government of the said church.

That in the two elections which intervened between that of *Dodds* and that of *Peterson*, which took place in 1629, the proceedings were conducted in the usual manner, without any interference of royal authority, and that the parties elected in those intervening elections were canons residentiary.

That *Peterson* and *Ward*, whose elections are mentioned in the affidavit of Mr. *Grylls*, were canons residentiary, and that they were elected in the usual form by the chapter on the bishop's license, and confirmed by the bishop as in all former cases. The same was stated of the two succeeding elections also which respectively took place in 1662 and 1663.

That on the 9th February, 1681, *Charles 2* addressed to the chapter and canons his writ commencing in the following terms:—"whereas we, by our letters patent, bearing even date with these presents, of our especial grace, certain knowledge, and mere motion have given and granted to our beloved in Christ *Richard Annesley*, &c. the deanery of our cathedral church of St. Peter, in Exeter, by the death of *George Carew*, the last dean there, now void, and to our donation belonging, to have and to hold the said deanery to the said *Richard Annesley* during his natural life, with all rights, &c. to the said deanery belonging or appertaining, &c. as in the same our letters patent is more fully contained, we therefore command you that to the said *Richard Annesley* the stall in the choir and place and voice in the chapter ye assign, or cause to be assigned, in all things diligently as is the custom." That *Annesley* was not at the date of the said royal writ a prebendary of said church. That on the 23d March following said *Annesley* was collated by the bishop to a prebend in the said church, that on the 6th April following the chapter installed *Annesley* to said prebend, and on the same day admitted him to the place of a residentiary. That on the 7th April, the chapter having received the bishop's license to elect a dean in the usual

form, proceeded in the usual way by election and elected *Annesley* dean, that the election was confirmed by the Bishop as in all former cases, and that *Annesley* was thereupon installed dean.

That in *all cases of deans subsequently* (being fourteen in number) there have been presented to the chapter royal letters patent granting to said several persons the deanery *as in the royal gift in full right*, and constituting such persons to be deans.


That notwithstanding the said letters, the chapter have in all said cases from and since 1553 to the present time, proceeded in the election of their dean under the bishop's license to elect granted in the accustomed form, and, the assent of the dean elect to the election being recorded and transmitted to the bishop, the bishop has proceeded to give his judicial sentence, confirming the election in the form and manner as anciently used. That all said fourteen deans were at and before the times of their several elections to the deanery canons residentiary of the said church. That five of them had been for some time residentiaries before their several elections to be deans, and the remaining nine deans were before their election to be dean installed by the chapter to a canonry or prebend on the bishop's collation, and afterwards elected and admitted residentiary, and after that elected dean.

That *Landon*, the late dean, died on the 29th December, 1838, that on the 9th January, 1839, the Bishop of Exeter issued his license to the chapter in the usual form to elect a dean; that the chapter on the next day issued the usual citation calling together the chapter to proceed to the election of a dean in the chapter-house on the 24th of same month. That on that day the chapter met and proceeded to the business of the election; that immediately before the chapter assembling on that day there were delivered to deponent, as chapter clerk, her majesty's letters patent under the great seal, dated the 22d of same month, whereby her majesty granted to Lord *Wriothesley Russell* the

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

1840.

  
The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

deanery of the said church, asserted to be in her majesty's gift in full right. That Lord *W. Russell* was not a canon of said church: that the election was prorogued and adjourned from time to time down to 27th June following and that at an adjournment of the chapter on the 4th April there were presented to the chapter letters patent of her majesty under the great seal, dated the 1st of same month whereby her majesty granted to the said *Grylls*, one of the prebendaries of the said church, the said deanery. That the said chapter was continued by adjournment to the 14th June, and being then assembled there were on that day delivered to deponent and presented to the chapter, letters of her majesty under the royal sign manual, addressed to the president and chapter, dated the 12th same month.

That Mr. *Grylls* is not a canon residentiary of the said church. That the business of the election was further adjourned to the 27th June, when the chapter being assembled, did, according to the custom of the said church unanimously elect the said *Lowe*, precentor and one of the canons residentiary, to be the dean of the said church.

The affidavit then stated *Lowe's* assent and installation after confirmation by the bishop, and that, immediately upon and after his installation, *he took upon himself the office*, and has ever since occupied the state of the dean and exercised the office of dean.

Mr. *Barnes* annexed to his affidavit various instruments connected with the foundation of the deanery, shewing the foundation and the endowment of it with three churches by *Brewer*, Bishop of Exeter. The confirmation by the Archbishop of Canterbury of the foundation contained the following passage:—"cum nuper ad ammonitionem nostram venerabilis frater *Willelmus*, Exoniensis episcopus de consensu capituli sui dignitatem decanatus in Ecclesia Exoniensi de novo duxerit ordinandam, *concedens eidem capitulo liberam electionem decani* qui eandem habeat potestatem et dignitatem quam habent alii decani cathedralium ecclesiarum in Angliâ, nos, processu ipsius coram nobis

et fratribus nostris recitato, dictam ordinationem ratam et gratam habentes, ipsam de consilio fratrum nostrorum auctoritate Cantuarensis ecclesiæ duximus confirmandam.”

The confirmation by the same bishop of Exeter of the first elected dean commenced thus:—*Willelmus*, Dei gratiâ Exoniensis episcopus, dilectis in Christo filiis capitulo Exon. salutem. Electionem vestram de viro venerabili Magistro Serlone Archidiacono Exoniensi factam, quem vobis primum decanum Exoniensis ecclesiæ unanimi assensu canonicè elegistis auctoritate episcopali confirmamus, *concedentes vobis* in posterum, pro nobis et successoribus nostris episcopis Exon. in perpetuum, *liberam potestatem eligendi decanum* in Ecclesiâ Exoniensi *de personâ idoneâ canonico* in Exoniensi Ecclesiâ, sed a nobis vel successoribus nostris episcopis Exon. ritè et canonicè confirmandum.”

Another instrument of the date of 1225, and sealed with the chapter seal, was in the following words:—“Omnibus Christi fidelibus præsens scriptum inspecturis, Capitulum beati Petri, &c. Exon. æternam in Domino salutem. No-  
verit universitas vestra, quod cum Exon. Ecclesia usque ad tempora nostra decano caruerit; nos, ad honorem Dei, et cultum in ecclesiâ ampliandum ad imitationem aliarum cathedralium ecclesiarum ordinaturum, de consensu venerabilis patris nostri *Willelmi Briwers* Exoniensis episcopi, concessimus et providimus ut in Exoniensi Ecclesiâ, temporibus nostris et in perpetuum, canonicè *a capitulo et de capitulo unus de canonicis eligatur decanus*, et solemniter institutur.”

The letters patent of the 1st April, 1839, granting the deanery, and the letters recommendatory of the 12th June, 1839, were also annexed to the affidavit. The letters patent commenced thus:—“*Victoria*, &c., to all to whom, &c. Know ye, that we of our especial grace, certain knowledge, and mere motion have given and granted, and by these presents for us, our heirs and successors, do give and grant to our trusty and well beloved *Thomas Grylls*, clerk, M.A. one of the prebendaries of our cathedral church of Exeter,

1840.

The QUEEN

v.


The Chapter  
of St. PETER'S,  
EXETER.



said *Thomas Grylls*, during his natural life, with singular rights, &c. commanding, and by these presents for us, our heirs and successors, firmly enjoining requiring the chapter and canons, or any others whom having sufficient power in this behalf, that they do fully and lawfully admit the said *Thomas Grylls* aforesaid deanery, and that they do institute and him dean thereof, with all its rights, &c., and that and perform all and singular other things which in any ways fit and necessary in this behalf."

The letters recommendatory of the 12th June, alluding to the death of Dr. *Landon*, and the vacancy, proceed thus:—"We being careful and desirous that a meet person both for learning and integrity, be placed in the deanery, have thought fit by these presents to recommend unto you our trusty and well beloved *Thomas Grylls* one of the prebendaries of our said cathedral church preferred to that place, whom we know to be ever able to undertake that government. We do therefore specially recommend him unto you, requiring and commanding you to assemble yourselves with all convenient speed and in due order to elect him dean of that our cathedral church, the same to be enjoyed by him, with all rights and privileges. To our trusty and well beloved the president and chapter of our cathedral church of Exeter."

Book, 17 *Edw.* 3, 17, (Trin. T.) and to the case of the deanery of St. *Patrick* in Ireland, in *Mason's* History of St. *Patrick's*, 459; which were both cases of quare impedit, and not of mandamus. The argument on this point is fully noticed in the judgment of the Court.

1840.  
  
 The QUEEN  
 v.  
 The Chapter  
 of St. PETER'S,  
 EXETER.

He also contended, if the crown had the right contended for, the proper remedy was by quare impedit, and referred to *Co. Litt.* 344 a, and 344 b; 17 *Vin. Abr.* Presentation (P. c. 3); *Fitz. N. B.* "Quare Impedit," 32 and 33; *Bro. Abr.* Quare Impedit, 56 and 83; *Com Dig.* Pleader, Proceedings in Quare Impedit (3 I); *Buller, J.* in *Bishop of Chichester v. Harward*(a); *Clarke v. Bishop of Sarum*(b); which last appeared from *Rex v. Bishop of Chester*(c), *Bowell v. Milbank*(d), and *Rex v. Marquis of Stafford*(e), not to be law; *Dyer*, 48 a; *Rex v. Baylay*(f); *Earl of Harrington v. Bishop of Litchfield*(g); *Boswell's* case(h).

Sir *J. Campbell*, A. G. contra, on the second point, relied on *Clarke v. Bishop of Sarum*(b); *Rex v. Bloer*(i).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court. — This was a rule for a mandamus to elect Mr. *Grylls* a canon residentiary, in order to qualify him for election as dean, and then to elect him into that office.

The facts appeared in the argument to stand thus: the bishopric was founded before the Conquest; there were twenty-four prebends, all in the bishop's gift.

The bishop of the diocese founded and endowed the deanery in the reign of King *Henry* the Third, viz. in the year 1225, subsequently of course to the charter of King

(a) 1 T. R. 650.

(b) 2 Stra. 1082.

(c) 1 T. R. 396.

(d) 1 T. R. 401, n.

(e) 3 T. R. 646.


(f) 1 B. & Ad. 761.

(g) 4 Bing. N. C. 77.

(h) 6 Rep. 49.

(i) 2 Burr. 1043.

1840.

  
The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

*John*, by which, in the year 1215, he granted to chapter that they should have the election quorumcumque prebendorum majorum et minorum. It appears to have been the last deanery founded in England prior to the dissolution of the monasteries. By the charter of foundation the dean was to be elected by the chapter from among the prebendaries, subject to the confirmation of the bishop and his successors. At a subsequent time, by a new statute, the chapter was divided into canons residentiary and prebendaries, the canons being elected by the chapter from among the prebendaries, and the practice from that time has always been that the dean should be elected from among the canons residentiary. The bishop has always issued a license to elect one of the canons; the canon elected has been presented to the bishop, who confirms the election, if all has been regular. The dean elect then takes the oath of canonical obedience to the bishop, who sends his mandate to the chapter to instal him. In two cases of lapse, occurring in the thirteenth and fourteenth centuries, the bishop collated. In 1553 the crown for the first time interposed, but *Edward* the Sixth died before that election was completed. In 1559 Queen *Elizabeth* sent a mandate to the chapter to elect: their answer was, that they could only elect a canon residentiary, and they requested her majesty either to qualify the person named, or dispense with his qualification. We are not informed how this matter ended. In the same reign three elections took place, in which we do not find the queen taking any part, nor can discover what was done, the records of the chapter being lost. But in 1629 *Charles* the First recommended one *Peterson*, who was a canon residentiary; he was elected, but it was under the bishop's license and with his confirmation; the usual instalment followed. In 1661 *Charles* the Second sent letters recommendatory; the particulars of what then occurred were not laid before us. In 1681 the same king granted the deanery to *Annesley*, who was not a prebendary, by letters patent, which state (incorrectly in fact) that the


deanery belonged to the donation of the crown. The bishop collated him to a prebend, and then issued his license to elect: he was elected, confirmed and installed, as on former occasions. Since that time fourteen deans have been chosen, nine of whom were strangers to the cathedral, but the bishop made them prebendaries, the chapter elected them canons residentiary, and the same proceedings were always pursued.

When the deanery became vacant in 1838, the crown nominated a stranger to the cathedral, and the chapter, in answer, returned to the effect that, as the act of 6 & 7 Will. 4, c. 67, suspending the power of chapters to fill vacant prebends prevented the nominee from obtaining one, that election could not take place. The crown then nominated Mr. *Grylls*, the gentleman on whose behalf the present rule has been obtained, being a prebendary but not a canon residentiary. The suspending act was again referred to by the chapter, as disabling them from qualifying Mr. *Grylls* into the latter office, and another act (2 Vict. c. 14) was passed, reciting, that by reason of the act 6 & 7 Will. 4, and the act 1 & 2 Vict. c. 108, continuing its operation, doubts were entertained whether any collation to a prebend, or any election to a canonry could be made in the church of Exeter, and enacting that nothing in either of these acts should, during the vacancy of any deanery, prevent any spiritual person from being collated to the prebend or canonry held by the late dean, for the purpose of qualifying to be elected or appointed dean. This act passed on the 4th June, 1839; on the 12th Mr. *Grylls* was again nominated by the crown to be dean, and to be first appointed canon residentiary: no step, however, was taken by the chapter on this intimation of her majesty's pleasure, and, on the contrary, they proceeded on the 27th of the same month to elect Mr. *Lowe*, who was a canon residentiary, into the office of dean, following in all respects the ancient practice and the practice of modern times also in all respects, save the important point of adopting the

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER'S,  
EXETER.

1840.

  
 The QUEEN  
 v.  
 The Chapter  
 of St. PETER'S,  
 EXETER.

recommendation of the crown, which was not only neglected, but contravened by the appointment of a different person.

In this state of things we are desired, on the part of the crown, to treat the appointment of Mr. *Lowe* as a nullity, and command the chapter to proceed to a new election, by first qualifying Mr. *Grylls*, and then electing him dean. His appointment to the late dean's canonry must be his qualification, and the chapter are no longer disabled by the suspending act from appointing him to a canonry. But, supposing this first step to be taken, is it possible to follow it up by any other?

The act of last year places the chapter in the position they held before 6 & 7 *Will.* 4, and restores the law to its former state with reference to the church of Exeter. What then was that position? Clearly, by the charter, their right was confined to that of choosing one of the prebendaries to be a canon residentiary, when required to elect by the bishop's license, and subject to his confirmation.

Now all this the chapter has done already, but, it is contended, all comes to nothing for want of the letter recommendatory, which the crown has now long been in the habit of addressing to them.

This assertion of a total transfer of the patronage from those to whom it was confided by the charter of foundation, ought to be supported by clear proof. And unquestionably it is borne out by the opinion, in point of law, of one of the most learned of our text writers, the late Mr. *Hargrave*, who, in his note to *Co. Lit.* 95, states the deans of the old foundations to be in exactly the same situation as the bishop, and declares that both are now in the sole nomination of the crown. But, with all deference to the research and erudition of a lawyer so eminent, we cannot forbear remarking that this is rather matter of fact than of law, for, as these old deaneries are created by different charters, some of which exist and of others the provisions are to be traced in the custom that has prevailed,

We cannot presume that the constitution of all is the same. In the cathedral church of Exeter we now know, in fact, that certain forms of election are prescribed: it follows that they must continue, unless altered by lawful authority. We know not what Mr. *Hargrave's* opinion might have been on this case, had he been aware that the deanery of Exeter was founded by the bishop, and not by the crown, and later than the charter of King *John*. He appears to assume that the king was founder and patron of all the old deaneries, and that they are all affected by that charter.

Mr. *Hargrave* does not suggest by what legal operation so great a change may have been wrought. The power of parliament first presents itself, but, while the act 25 *Hen. 8* has spoken so plainly and effectually on the election of bishops, it makes no allusion to that of deans, nor is any other act with that object to be discovered. We were, indeed, reminded of the dicta of some great judges that they would presume even an act of parliament, if necessary, in support of an ancient usage. And even this strong presumption it might not be unreasonable to make, where the usage has been such as nothing but an act could legalise, and has prevailed in those obscure ages in which not only the records of parliament may have been negligently kept, but even the form of a parliament itself is scarcely to be discerned. But no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last two hundred and fifty years on an important subject of the most general interest, of which no vestige can be found on the parliament roll, in the journals of either House of Parliament, in any records of the Courts of Law, in the numerous treatises of enlightened authors, devoting unwearied industry and the greatest accuracy to similar inquiries, or in the history of the country. These observations apply almost with equal force to the other supposition of a right being created in the crown to appoint deans of Exeter, which was thrown out by the learned Attorney-General. He said that the ancient


1840.

The QUEEN

v.

The Chapter  
of St. PETER'S,  
EXETER.

1840.

  
**The QUEEN**  
 v.  
**The Chapter**  
**of St. PETER'S,**  
**EXETER.**

practice might possibly have been changed by a composition among all who were competent to make one. But, without inquiring into the difficult question how far and by what means such power of change may be lawfully exercised, we do not believe that it ever ~~was so~~ exercised. We have no doubt that it was not, because it is as sure to have been well known and recorded as even an act of parliament. In our opinion no Court could be justified in originating proceedings of which the termination desired by the applicant can be obtained only by a jury affirming by their verdict, as a fact, that which the same Court is fully persuaded to be false, and no mortal believes to be true.

Supposing either presumption admissible, it would still however be no easy matter to state any positive right, as a legitimate inference from the facts which appear in these affidavits. The result of them is, that for something more than two centuries the chapter has always elected on the recommendation of the crown, but it is the chapter which has elected. Their acceptance of the crown's nominee is no proof that they were bound, or even thought themselves bound, to accept him. They may have chosen to do so. The form, indeed, is nearly the same as that of electing a bishop; but an act of parliament was found requisite to enable the crown to appoint a bishop in case the dean and chapter refused to elect him whom the crown recommended. Again, in these elections of the dean of Exeter the bishop is and always has been a party, and the improbable presumption, that he also bound himself to qualify and confirm whomsoever the crown might induce the chapter to elect, is another indispensable ingredient in the right supposed.

But, if all these obstacles were removed, the objection would still remain in full force, that the law has provided ~~a~~ specific remedy by which the crown may obtain its rights— if they be such as the law recognises, and the writ of mandamus is not necessary.

If the deanery were a donative in the crown the election—

By the chapter would be a mere nullity, the letters patent of the crown would confer the deanery at once with all its rights, and the person elected by the chapter would be liable to actions as a trespasser and wrongdoer. But this is not pretended. Again, if the deanery were in the presentation of the crown as patron, or if the crown had a right to nominate a person to the chapter, to be by them presented to the bishop for institution to the deanery, a right of which many instances occur, and which is fully recognised in our books, the well known remedy is by writ of quare impedit, and this Court has never interfered by mandamus when that writ lies.

But it was not pretended that the crown has the right either to present or to nominate in the legal sense of that term.

The argument was, that the crown has a right to recommend, and that the chapter are bound to elect the person recommended, so that their election of any other is void—in other words, that the recommendation of the crown is necessary in order to qualify and render any person eligible by the chapter. If this were so, and the power of so recommending were a legal right, short of a right of nomination as above, no doubt the proceedings of the chapter would be void, and the only remedy would be by mandamus. But we have not been referred to any authority shewing that such power of recommending is a legal right. It is in contravention of the right originally belonging to the founder of the deanery in question, which is a private foundation, of which the crown is not patron or founder, and we are not furnished with any ground upon which this Court can be warranted in issuing a writ of mandamus.

1840.

The QUEEN  
v.  
The Chapter  
of St. PETER's,  
EXETER.

Rule discharged.



1840.

*Wednesday,  
June 24th.*

Although a parish forms part of a union under 4 & 5 W. 4, c. 76, the parish land is not devested out of the churchwardens and overseers, so as to disable them from bringing ejectment, either by s. 21 of that act, or by 5 & 6 W. 4, c. 69, s. 3.

Where a deed purported to convey a messuage with the appurtenances, purchased at an auction, it was held that neither the conditions of sale at the auction, signed by the purchaser, nor his own declarations as to the extent of his purchase, were admissible in evidence, to shew that a garden which had been usually enjoyed with the messuages was expressly excepted from the sale.

DOE on the demise of NORTON and WHEELER, Churchwardens of the Parish and Parish Church of BUGBROOK, and BROWN and MORTON as Overseers of the said Parish, and on the demise of NORTON and WHEELER as Churchwardens of the said Parish *v.* WEBSTER.

AT the trial of this case before *Bosanquet J.* at the Northamptonshire spring assizes, 1839, it appeared that the lessors of the plaintiff, who were the churchwardens and overseers of the parish of Bugbrook, brought this ejectment to recover land the alleged property of the said parish. In July, 1836, the Poor Law Commissioners had, under the provisions of 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, directed the guardians of the Northampton union, in which Bugbrook was situate, to sell "all that messuage or tenement formerly used as the parish workhouse, but now occupied by &c., and all those fifteen cottages with small gardens thereto, now in the several tenures or occupations of &c., all which said premises are freeholds, and are situate, standing, and being in the parish of Bugbrook."

The property comprised in this order of the commissioners was sold by auction in lots, and the defendant purchased one of the lots. The lot purchased by the defendant was described in the handbills, containing the conditions of sale, as "all that messuage or tenement formerly used as the parish workhouse, and all those seven cottages with small gardens and appurtenances thereto, in the occupation of &c., all which premises are situate, standing, and being in the parish of Bugbrook (*except one rood and seventeen poles*, lying near and adjoining the above-mentioned messuage, lately used as a parish workhouse, which is the property of the churchwardens of Bugbrook aforesaid)." The parcels were described in the deed of conveyance to the defendant in the same terms as in the handbill, with this variation, that after the words "being in the parish of Bugbrook," were the additional words "together

appurtenances thereunto belonging," and that the name as to the *one rood seventeen poles* was omitted. The test at the trial was, whether this one rood and seven poles, which was garden ground and had been sold with the workhouse, passed by the conveyance to the defendant. To shew that this piece of ground was a portion of the premises sold to the defendant, a copy of the conditions of sale and a description of the lot sold to the defendant, with the exception as to the one rood seventeen poles, was admitted in evidence.

A handbill appeared a written acknowledgment, signed by the defendant, that he had purchased the lot in question. A verbal admission by the defendant, after the trial, that he had not bought the one rood seventeen poles was received in evidence. On behalf of the defendant it was objected that the evidence ought not have been received, and it was also objected that the effect of 4 & 5 Will. 4, c. 76, s. 21 (a), and of 5 & 6 W. 4, c. 69, s. 3 (b),

(a) 4 & 5 Will. 4, c. 76, s. 21, "That except where otherwise provided by this act, all powers and authorities given by any act, and all acts done in pursuance of such acts respectively, shall be as valid and effectual as if all the powers and authorities given by every other act, and all acts done in pursuance thereof, relating to the building, or enlarging of poor-law workhouses, and to the purchasing, hiring, holding, exchanging and disposing of land whereon may have been or may be erected, and of parish houses for the reception of poor persons &c. shall in and to all respects be exercised by the persons authorized by law to exercise the same, or the control &c. of the poor-law commissioners."

IV.

(b) 5 & 6 Will. 4, c. 69, s. 3.—  
"In order to ensure the due application of the property of parishes and unions, be it enacted, that it shall be lawful for the guardians of any parish or union, and for the overseers of any parish not under the management of a board of guardians, and for the guardians or trustees, guardian or trustee of any dissolved union, or the person or persons who were the guardians or trustees, guardian or trustee of any dissolved union at the time of its dissolution, or a majority of such guardians, trustees, or persons, if more than one, with the approbation, and subject to the rules, orders, and regulations of the poor-law commissioners, to sell, exchange, let, or otherwise to dispose of any workhouses, buildings, land, effects, or other property belonging to any such parish or union, or

T

1840.

DOE  
d.  
NORTON  
v.  
WEBSTER.

1840.

DOE  
d.  
NORTON  
v.  
WEBSTER.

was to divest out of the officers of a parish forming part of a union all title to the parish property, and that the lessors of the plaintiff therefore could not recover. The learned judge reserved leave to move to enter a nonsuit on the point of title.

Verdict for the plaintiff.

A rule nisi having been obtained for a nonsuit accordingly, and also for a new trial, on the ground that neither the handbill nor the declaration by the defendant as to the extent of his purchase were admissible in evidence,

*Adams Serjt. and Humfrey* shewed cause (a). On the point of title they contended that the two sections related to the management of parish property, and did not alter the ownership of it, and referred to *Doe d. Jackson v. Hiley* (b).

On the point of evidence they contended that the word "appurtenances," under which the defendant claimed the garden, being a doubtful word, the handbill and the verbal admission of the defendant were admissible, on a question of "parcel" or "no parcel," and that they did not contradict any clear expression in the conveyance.

*M. D. Hill, Waddington and Hayes* contra. The 59 Geo. 3, c. 12, so far as relates to the present question of ownership in the workhouse of a parish within a union may be considered as at an end. [Lord Denman C.J. referred to *Allason v. Stark* (c).] By 4 & 5 Will. 4, c. 76, ss. 21 and 26, and 5 & 6 Will. 4, c. 69, s. 3, the parish officers have neither the control nor the use of the parish property; and, on the other hand, the guardians are empowered to sell it, and it could hardly be meant that they should have power

vested in trustees or feoffees in trust for such parish or union &c. and to convey, assign, or transfer the same accordingly to the purchasers or parties exchanging, as they shall direct &c."

(a) On a former day, in the sittings after term, (June 19.)

(b) 10 B. & C. 885; S. C. 5 M. & R. 706.

(c) 1 P. & D. 183.

property of others. [*Patteson J.* The construction be that the property vests in the guardians for the purpose of selling, but not unless they proceed to sell.] regard to the admissibility of the handbill, and the guardian's declaration, it is clear that even without the words "mesuages" in the conveyance, the word "messuages" would of itself pass the garden: *Co. Litt.* 5 b, 56 b. *Tuck (a)*, & *Wms. Saund.* 401, n. (2). [*Patteson J.* in *Beaumont v. Field (b)*.] The evidence was not sufficient to explain any latent ambiguity as to the parcels, or what the agreement was, and in contradiction of the conveyance. There was no doubt in this case as to the land having been held with the workhouse.

1840.  
Doe  
d.  
Norton  
v.  
Webster.

**DENMAN C. J.**—Although the language of the statute is so large as hardly to be consistent with the notion of any property of a parish forming part of a union in the hands of the parish officers, yet that language is not sufficient to divest the property out of them.

**SON J.(c)**—I am of the same opinion. There is no interest in the estate, but a mere power to sell.

**MS J.** concurred.

Rule for nonsuit discharged.

As to the admissibility of evidence,  
*Cur. adv. vult.*

**DENMAN C. J.** now delivered the judgment of the court. We have already disposed of all the points (a) in this case but one—the admission of the conditions stated in the defendant's declarations as to the extent of a

|                            |                                   |
|----------------------------|-----------------------------------|
| Eliz. 89.                  | the case, as to the competency of |
| & Ald. 247.                | a witness, which is not worth re- |
| Edale J. was absent.       | porting.                          |
| There was another point in |                                   |

1840.  
 ~~~~~  
 Doe  
 d.  
 NORTON  
 v.  
 WEBSTER.

purchase which he had made; those were supposed to vary the terms of the purchase deed. The question was, whether a garden was conveyed together with a workhouse under the words "with the appurtenances thereunto belonging." Now the cases cited by Mr. Serjeant *Williams* in the note to 2 *Saund.* p. 401, and the case of *Buck v. Nurton* (a) shew that the garden, if occupied with the house, would certainly pass by the word "appurtenances." It was proved in this case that it was occupied with the workhouse, and therefore it is strictly within the meaning of the words of the deed. No doubt evidence was admissible to shew that it was not occupied with the workhouse, and so was not appurtenant to it. But, beyond that, the conditions of sale were received in evidence to shew that it was expressly excepted out of the sale, and declarations of the defendant were received that he had not bought it. This evidence went to contradict the deed, not to apply the words of it to any particular thing, and indeed, as was argued at the bar, the very exception of the garden in the conditions of sale shews that if not excepted it would have passed, and therefore shews that to let in evidence of the exception is in truth to add to the deed an exception which contradicts it as it now stands. Then the case of *Doe d. Preedy v. Holton* (b) is directly in point to shew that the evidence was not receivable for such purposes. Upon this ground we think that there must be a new trial.

Some discussion took place as to a piece of ground on the other side of a road, as to which the lessor of the plaintiff contended that he was at all events entitled, but we cannot grant a new trial as to part, and not as to the rest.

Rule absolute for a new trial.

(a) 1 R. & P. 33.

(b) 4 A. & E. 76; S. C. 5 N. & M. 391.



1840.

Monday,  
June 22d.

DOE *d.* GARROD *v.* OLLEY and another.

**EJECTMENT** for copyhold lands, tried before *Vaughan* J., at the Suffolk spring assizes, 1839, against the defendants, as assignees of one *Burgess*, a bankrupt. The lessor of the plaintiff claimed under a conditional surrender in fee from *Garrod*, by way of mortgage, and in support of his case produced the court rolls in evidence, which contained entries of a presentment by the homage in Court of such a surrender out of Court, and of the admittance of the lessor of the plaintiff. This evidence was received after objection at the title, which depended on a surrender out of Court, could not be evidenced against the alleged surrenderor by entries, which were the mere act of the steward of the manor.

In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of Court, and of his admittance, are evidence of his title against the alleged surrenderor.

The defendants then endeavoured to make out that the relation of landlord and tenant had been created between the plaintiff and *Burgess*, and contended that they were entitled to notice to quit, which had not been given. For this purpose they put in evidence the mortgage deed of the premises, from *Burgess* to the plaintiff, dated the 11th January, 1836. The deed, after reciting that the plaintiff had lent *Burgess* 850*l.*, as security for this sum and for any further sums (not exceeding 150*l.*) that might be lent by the plaintiff to *Burgess*, contained a covenant by *Burgess* to surrender the copyholds in fee. There was a proviso for voiding the deed on payment of 850*l.*, and any further sum that might be due on the 11th July then next, and a power

A mortgage deed of the 11th January, 1836, contained a covenant to surrender copyhold property to the mortgagee in fee, as a security for a debt of 850*l.*, which was to be repaid on the 11th July following, and gave the mortgagee power of sale on default. The deed then contained a clause that the mortgagor

should, during his occupation of the premises, yield and pay to the mortgagee the yearly rent or sum of 50*l.*, by equal half-yearly payments, on the 11th July and the 11th January in every year, the first half-yearly payment to be made on the 11th July next, and that it should be lawful for the mortgagee to have and use such remedies by distress, as landlords have for rent upon common demises, *provided that the reservation of such rent should not prejudice the right of the mortgagee to enter into and take possession of the premises covenanted to be surrendered, and evict the mortgagor, at any time after default made in payment of the monies thereby intended to be secured.* In November, 1837, the mortgagee distrained for 50*l.*, "being for rent due up to the 11th July last:"—Held, that the above reservation of rent, and distress for rent, had not created the relation of landlord and tenant between the parties, so as to entitle the mortgagor to notice to quit before ejectment.

1840.

DOE

d.

GARROD

v.

OLLEY.

given to the plaintiff of selling the copyholds on default of payment. The deed concluded thus, "And lastly, it is declared and agreed between the parties, that the said *John Burgess*, his heirs or assigns, shall, during his or their occupation of the said copyhold messuages, hereditaments and premises, hereinbefore covenanted to be surrendered, or any part or parts thereof, *yield and pay* for the same to the said *John Garrod*, his heirs, executors, &c. the yearly rent or sum of 50*l.*, free from all deductions whatsoever, by equal half-yearly payments, on the 11th July and 11th January in every year, the first half-yearly payment to be made on the 11th July next. And that it shall be lawful for the said *J. Garrod*, his heirs, &c. to have and use such remedies by distress and sale, or otherwise, for the recovery of the said yearly rent of 50*l.*, or any part thereof, when in arrear, as landlords have for recovery of rents upon common demises. Provided that the reservation of such rent shall *not prejudice* the right of the said *J. Garrod*, his heirs, &c. to enter into and take possession of the said hereditaments and premises hereinbefore covenanted to be surrendered, or any part thereof, and to evict the said *J. Burgess*, his heirs, &c. and all other occupiers and tenants thereof, at any time after default shall be made in payment of the moneys intended to be hereby secured, or any part thereof, as aforesaid." The defendants also gave evidence that on the 22d November, 1837, the plaintiff had distrained on *Burgess* for 50*l.*, "being" (as stated in the notice of distress) "rent and arrears of rent due from the said *J. Burgess* to *J. Garrod* for the same house and premises up to the 11th July last." Verdict for the plaintiff. Leave reserved to the defendant to move to enter a nonsuit, on the ground that the court rolls were not evidence of the title relied upon.

*Kelly* having obtained a rule accordingly, and also for a new trial, on the ground that the defendants were entitled to a notice to quit,

*Storks* Serjt. and *Byles* now shewed cause. To shew

that the court rolls were the proper evidence of the surrender, although made out of court; they cited *Doe d. Bennington v. Hall* (a), *Doe d. Priestley v. Calloway* (b). [Patteson J. referred to *Doe d. Hawthorn v. Mee* (c).]

As to the other point, it is expressly provided that the reservation of the sum of 50*l.*, which was not by way of rent, but was a sum in gross, and to go in payment of interest and of part principal, shall not prejudice the right of the mortgagee to bring ejectment. The distress in 1837 could not at all events amount to a waiver of a subsequent breach.

*Kelly and Palmer* contra. The court rolls containing the admittance of the plaintiff would have been evidence against the lord, but were not evidence against a tenant. The court rolls were evidence made behind the back of the party against whom they were produced. The surrender should have been produced. *Rex v. Inhabitants of Thruscross* (d) was mentioned at the trial, but the marginal note only of the case was read; the case itself is no authority on this point. *Doe d. Bennington v. Hall* (a) merely establishes that in cases where the court rolls are the proper evidence of particular facts, those facts may be proved by the original entries on the court rolls alone, without also shewing a stamped copy. In *Doe d. Priestley v. Calloway* (b) this point was never discussed, it was conceded that the court rolls themselves would be evidence, and the only question was, whether a draft entry of a presentment, together with parol testimony of the homage jury, who made the presentment, could be received as evidence. The defendants were entitled to notice to quit. The clause in the mortgage deed certainly enabled the mortgagee to treat the mortgagor as trespasser, notwithstanding the option that was given him of enforcing payment by distress, but, as soon as the mortgagee actually distrained he exercised his option,

1840.

DOE  
d.  
GARROD  
v.  
OLLEY.

(a) 16 East, 208.

(c) 1 N. &amp; M. 424.

(b) 6 B. &amp; C. 484; S. C. 9 D. &amp; R. 518.

(d) 1 A. &amp; E. 126; S. C. 3 N. &amp; M. 289.



1840.

DOE

d.

GARROD

v.

OLLEY.

and elected to treat the mortgagor as tenant. Although there are no words of demise, yet the "reservation of rent" shews that the mortgagor was not a trespasser, but tenant at will. The agreement for the payment of 50*l.* a year, upon a loan of 850*l.*, of itself renders it probable that a tenancy was contemplated, for the purpose of disguising a usurious transaction.

LORD DENMAN C. J.—The sum to be paid as rent certainly does not agree with the sum payable as interest, and the deed certainly contains terms which seem to point at the relation of landlord and tenant, yet there is an express proviso that the mortgagee should notwithstanding have his remedy by eviction, and I am of opinion that the true construction is, that the distress was not to bind him to treat the mortgagor as tenant, and that no notice to quit was necessary.

As to the other point, the court rolls were clearly receivable as evidence of the plaintiff's title.

PATTESON and WILLIAMS Js. concurred.

Rule discharged.

DOE, on the several demises of SARAH BLIGHT and others,  
v. PETT (a).

Testator, in 1804, devised his real property to his brother-in-law, Wm. P., but

at that time had no interest in the land in question.

THIS was an action of ejectment, brought to recover the possession of an estate called "Berry Parks and Verkas-

(a) Decided in Easter term last (May 1st).

In 1814 he purchased the land, on which occasion the residue of an outstanding term of 500 years, created in 1793, was assigned to Wm. P., in trust for the testator, to attend the inheritance. The testator died in 1820, when the fee simple descended, as to one moiety, to the testator's four nieces, and, as to the other, to his sister, the wife of Wm. P.

Wm. P. and his wife shortly afterwards entered into possession of the whole of the premises, and received the rents, without accounting to the other co-parceners; and in 1823 Wm. P. and his wife executed a feoffment, with livery of seisin, and afterwards a

table," in the parish of Shebbear, in the county of Devon, on several demises, laid upon the 2nd of January, 1838.

First, On the joint demise of the said *Sarah Blight*, *William Hockin Braund* the elder, *Samuel Bonifant* and *Elizabeth* his wife, and *Lewis Braund* and *Frances* his wife. Secondly, On the joint demise of the said *Sarah Blight*, *William Hockin Braund* the younger, the said *Samuel Bonifant* and *Elizabeth* his wife, and the said *Lewis Braund* and *Frances* his wife. Thirdly, On the separate demise of the said *Samuel Bonifant*.

Upon the trial before Lord *Denman* C. J., at the Devon spring assizes, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

1840.

DOE  
d.BLIGHT  
v.  
PETT.

fine sur cognisance de droit come ceo was levied *with proclamations*, in which the feoffee was plaintiff and the feoffors defendants. At the time of the testator's death and of the fine, his nieces were under coverture. *Wm. P.* died in 1828, having continued in sole possession. By his will he devised to the defendant, but made no mention therein of the term. The defendant entered, and continued in possession to the time of the ejectment brought against him in 1838. In 1837 the wife of *Wm. P.* died, and in the same year administration de bonis non of *Wm. P.* was granted to *Sam. B.*, the husband of one of the coparceners.

In 1836 one of the coparceners died, leaving her husband her surviving, and in 1837 the husband of another coparcener died.

The declaration in ejectment contained a count on a joint demise by the widow coparcener, the husband of the coparcener deceased, and the other two coparceners and their husbands; and also a count on a demise by *Sam. B.*, the administrator de bonis non of *Wm. P.*

Just before ejectment brought, *Sam. B.* made an actual entry on the premises, demanding them on behalf of himself and the other lessors of the plaintiff in the first count, and stating that he entered to avoid all fines.

*Held*, that by the feoffment and fine with proclamations there had been an absolute disseisin of the coparceners, and not a disseisin at election, and that an entry within five years was necessary to avoid the fine.

That the entry was too late as to the two husbands, and being too late as to them, was too late as to their wives, the coparceners also, during coverture, although they would have five years to enter after discoverture.

That the joint demise being therefore bad as to the husbands, it could not be supported as to the other parties.

That the fine and feoffment of the termor had caused a forfeiture of the term, and entitled the freeholder to enter within five years.

That the freeholder might, however, waive the forfeiture, and enter within five years after the expiration of the term.

That as the freeholder might waive the forfeiture of the term, he might treat it as still subsisting for another purpose, and acquire it for his own benefit.

That therefore *Sam. B.*, who had acquired the term as administrator de bonis non of the termor, might set it up for his own benefit, and that the count on his single demise was good.

That though the lessors of the plaintiff were beneficially entitled to a moiety only of the land, the verdict must, in point of form, be entered for the whole, as the term could not be divided.

1840.

DOE

d.

BLIGHT

v.

PETT.

In 1804 *James Millman*, having then no interest in the premises in dispute, made his will, whereby, after certain devises and legacies, he devised the residue of his property, real and personal, to his brother-in-law, *William Pett*, the father of the defendant. In 1814 *James Millman* purchased *Berry Parks and Verkastable* (the premises in question), which property was conveyed to him by lease and release, dated 22nd and 23rd August, 1814. The indenture of release contained also an assignment to the said *Wm. Pett*, the father of the defendant, of an outstanding term of 500 years, created in the year 1793, to hold to the said *Wm. Pett*, his executors, administrators and assigns, in trust for the said *James Millman*, his heirs and assigns. The indenture of release was executed by the said *James Millman*, but the said *Wm. Pett* neither executed the said indenture of release, nor disclaimed the said term of 500 years.

The said *James Millman* had two sisters, one of whom was *Mary*, the wife of the said *Wm. Pett* and mother of the defendant, who survived the said *James Millman*, and the other of whom was *Ann Perkin*, who died in the lifetime of the said *James Millman*, leaving four daughters, namely, *Surah*, the wife of *Wm. Blight*, deceased; *Elizabeth*, the wife of *Samuel Bonifant*; *Frances*, the wife of *Lewis Braund*; and *Mary*, the late wife of the said *Wm. Hockin Braund* the elder, one of the lessors of the plaintiff, and mother of the said *Wm. Hockin Braund* the younger, one other of the lessors of the plaintiff.

In 1820 the said *James Millman*, being seised in fee of the premises in question, died without issue, and without having altered or republished the will of 1804, and without having made any new will or codicil since the making of the will of 1804, leaving the said *Mary Pett* and his said four nieces his coheirs at law.

On the death of the said *James Millman*, his said will was duly proved by the said *Wm. Pett*, the father, who immediately entered into possession of the whole of the premises, and received the rents thereof, rendering no ac-

of any such rents or profits to any of the said co-  
ers, and considering himself to be entitled under the  
H.

the 29th August, 1823, the said *Wm. Pett* the  
and *Mary Pett* his wife, enfeoffed *Joseph Risdon*  
premises, to such uses as the said *Wm. Pett* should  
t, and gave him livery of seisin; and afterwards a  
r conuzance de droit come ceo was levied with  
nations between the said *Joseph Risdon*, plaintiff,  
e said *Wm. Pett* and *Mary* his wife, deforciant, of  
d premises, among others, before certain commis-  
, by commission bearing date the 8th day of Sep-  
, 4 Geo. 4, returnable from the day of the Holy  
in three weeks.

he time of the death of the said *James Millman*, and  
the time of the making of the said feoffment and of  
ying of the said fine, the said four nieces of the said  
*Millman* were coverts-baron. *Mary Braund* died in  
eaving her husband, the first mentioned *Wm. Hockin*  
d, and also the said *Wm. Hockin Braund* the younger,  
and heir, her surviving. *Wm. Blight*, the husband  
said *Sarah Blight*, died in 1837. The coverture of  
d *Elizabeth Bonifant* and *Frances Braund*, the two  
nieces of the said *James Millman*, still subsists.

the 5th of June, 1828, the said *William Pett*, the  
id of the said *Mary Pett* and the father of the de-  
t, having continued in the sole possession of the said  
es to that period, died, having first made his will,  
y he devised the premises to his son, *Wm. Pett* (the  
t defendant), for life (who thereupon entered and  
ied since in possession), with remainder to his grand-  
fee; and appointed his wife, *Mary Pett*, executrix.  
*Pett* proved the will in the July following, in the  
aconry Court of Barnstaple. On the 6th of Febru-  
37, *Mary Pett* died intestate, whereupon adminis-  
of all and singular the goods, chattels and credits  
er of the said *Mary Pett*, deceased, at the time of

1840.

DOE  
d.  
BLIGHT  
v.  
PETT.

1840.



DOE  
d.  
BLIGHT  
v.  
PETT.

her death, was granted to the defendant. On the 15th November, 1837, administration of all and singular the goods, chattels and credits whatever of the said *Wm. Pett* the father, left unadministered by *Mary Pett*, his executrix, was granted to the said *Samuel Bonifant*. On the 1st of January, 1838, *Samuel Bonifant* made an actual entry upon the premises in question, claiming and demanding the same, on behalf of himself and of his said wife, of the said *Sarah Blight*, of the said *Wm. Hockin Braund*, and the said *Lewis Braund* and *Frances* his wife, and of the said *Wm. Hockin Braund* the younger, and stating that he made that entry also for the purpose of avoiding all fines.

The questions for the opinion of the Court are—

First. Whether the term of 500 years, or a moiety thereof, is now vested in *Bonifant* by virtue of the grant of administration de bonis non of *Wm. Pett* the father.

2ndly. Whether the term of 500 years, or a moiety thereof, merged in the freehold and inheritance which descended to *Mary Pett*, and of which the said *Wm. Pett*, the father, and *Mary Pett*, were seised in her right.

3rdly. Whether the term of 500 years was destroyed by the feoffment and fine.

4thly. Whether the feoffment made by *Pett* and wife was or was not void.

5thly. Whether the fine levied to *Risdon* was or was not void.

6thly. Whether, notwithstanding the coverture of the four nieces of *Millman*, the right of entry of the lessors of the plaintiff, or of any of them, was barred by the feoffment and fine.

7thly. Whether, by the entry made by *Bonifant*, the operation of the fine was avoided in the whole or in part.

8thly. Whether the demises are properly laid in the declaration.

Should the Court be of opinion that the plaintiff is entitled to recover the entirety of the premises or the moiety or any other part thereof, under any of the said three de-

misses, a verdict to be entered accordingly; otherwise a nonsuit to be entered.

The case was argued (*a*) at the sittings after Michaelmas term, 1839, by *Manning* for the plaintiff, and *Erle* for the defendant.

1840.  
  
 DOE  
*d.*  
 BLIGHT  
*v.*  
 PETT.

*Cur. adv. vult.*

LORD DENMAN C.J. delivered the judgment of the Court. This is a case of considerable intricacy, and it is necessary to attend closely to the dates and situation of the parties, in order to see its bearings. The original testator's will is dated in 1804, and was never republished. He did not acquire any interest in the property in question till 1814, when he purchased the fee simple, so that his will was inoperative upon the freehold inheritance of the land. A term of years in the land had been assigned, in 1814, to *Wm. Pett* (the residuary legatee in the will), to attend the inheritance; that term did not pass by the will, for it never was in the testator. Upon the testator's death in 1820, the fee simple descended to *Mary Pett* as to one moiety, and to *Sarah Blight, Elizabeth Bonifant, Frances Braund, and Mary Braund*, as to the other moiety, the term of years still being in *Wm. Pett*, the husband of *Mary*. One question made in the case is, whether that term merged in the inheritance of *Mary Pett*; but upon the argument that point was very properly given up.

*Wm.* and *Mary Pett* entered into possession, and received the rents without accounting to the other coparceners, and in August, 1823, enfeoffed *Joseph Risdon*. By that feoffment undoubtedly the fee passed to *Risdon*, the feoffment being tortious indeed as to a moiety, but not the less operative, inasmuch as the possession was in the feoffors. See Mr. *Butler's* elaborate note to *Co. Litt.* 330 b; see also *Co. Litt.* 373 b and 574 a. "Here it is to be understood that

(a) Before Lord Denman C.J., *Littledale, Patterson, and Williams Js.*

1840.

DE

d.

BLIGHT

v.

PETT.

when one coparcener doth generally enter into the whole, this doth not divest the estate which descendeth by the law to the other, *unless he that doth enter claimeth the whole and taketh the profits of the whole*, for that shall divest the freehold in law of the other parcener. Otherwise it is after the parcnere be actually seised (which they were not here); the taking of the whole profits, or any claim made by the one, cannot put the other out of possession without an actual putting out or disseisin; and in this case of *Littleton*, where one coparcener entereth into the whole, and maketh a feoffment of the whole, this divesteth the freehold in law out of the other coparcener." See also *Co. Litt.* 243 b, entirely to the same effect. *Moore*, 60, is also an authority to the same point, and 4 *Leonard*, 52; *Townsend* and *Pastor's* case. The feoffment therefore was not void, nor the fine subsequently levied. The doctrine of disseisin at election, as laid down by Lord *Mansfield* in the case of *Taylor v. Horde*, 1 *Burr.* 60, does not apply to cases of fines with proclamations, for his lordship there says, in p. 113, "*Except the special case of fines with proclamations* (which stands entirely upon distinct grounds, and the construction of the statute 4 *Hen. 7*, c. 24, for the sake of the bar), I cannot think of a case where the true owner, whose entry is not taken away, may not elect (by pursuing a possessory remedy) to be deemed as not having been disseised." It follows that an entry was necessary to avoid the fine in question. Now as all the parties were married women at the date of the fine, the entry might be within five years after they became discover, as regards them, or within five years of their death if they died under coverture, as regards their heirs. The entry in this case was on the 1st January, 1838, (assuming for the purpose of the argument that it was an entry properly made and with proper authority,) and it was in proper time as regards *Sarah Blight*, whose husband died in 1837, and as regards *Wm. Hockin Braund* the younger, whose mother, *Mary Braund*, died in 1836 under coverture. But the entry was not in proper time as regards *Samuel Bonifant*

his wife, and *Lewis Braund* and his wife; for it was  
 exactly held in *Doe v. Plumptre* (a), on the authority of  
*do v. Heylock* (b), that the husband is barred by the fine  
 of five years, although the wife has five years after dis-  
 coverture; and, as the wife cannot, during coverture, demise,  
 sue or enter without her husband, it follows that the entry,  
 being too late as to him, is too late as to her during her co-  
 verture. This brings us to the question whether the demises  
 properly laid in this declaration. The first and second  
 the joint demise of the husbands as well as the other  
 demises. They are clearly wrong as to them and their wives,  
 being so, cannot be supported as to the other parties;  
 if we held them right as to those other parties, we should  
 in effect treating a joint demise as four several demises.  
 The first and second demise being thus out of the ques-  
 tion, the third remains to be considered, which relates to the  
 number of years assigned to *Wm. Pett* to attend the inheri-  
 tance. Now as *Mary Pett*, the executrix of *Wm. Pett*, died  
 intestate, the legal interest in this term, if it still subsists,  
 must be in *Samuel Bonifant*, the administrator de bonis  
 non; for we do not feel ourselves at liberty to presume that  
 the term vested in the defendant under the will of his father,  
 without the assent of *Mary Pett* the executrix, inasmuch as  
 the will does not contain any express mention of the term,  
 and the assent of the executrix stated as a fact in the  
 declaration. The point then on this demise is, whether the term  
 is destroyed by the feoffment in 1823. Now the feoff-  
 ment was made by the termor himself; and all the authori-  
 ties which are collected in *Doe v. Lynes* (c), and in the  
 notes to *Clerke v. Pywell* (d), shew that in such case the  
 term is forfeited, and by reason of the fine the person enti-  
 tled to the remainder or reversion, or rather perhaps we  
 should say the person entitled to the freehold, unless under  
 disability, must enter within five years, in order to take ad-

1840.

DOE  
 v.  
 BLIGHT  
 v.  
 PETT.

(a) 3 B. &amp; Ald. 474.

(b) Cro. Car. 200.

(c) 3 B. & C. 388; S. C. 5 D.  
 & R. 160.

(d) 1 Saund. 319.



1840.  
 ~~~~~  
 Doe  
 d.  
 BLIGHT  
 v.  
 PETT.

vantage of the forfeiture ; as to which entry in this particular case we have already expressed our opinion. Or such person may waive the forfeiture, and enter at any time within five years after the expiration of the term, for he has two titles, one by the forfeiture, the other by the expiration of the term. And the latter title is held to be a new right, which first accrues after the expiration of the term, and so within the second saving of 4 *Hen. 7*, c. 24. See *Whaley v. Tankard* (a), and the other cases cited in Mr. Serjt. Williams's note, above alluded to. And though a distinction is supposed to be taken in *Margaret Podger's case* (b) between a feoffment and fine by tenant for life and by tenant for years, yet, on examining that passage, it relates only to cases where a stranger ousts the lessee for years and disseises the lessor, which are very different from a feoffment and fine by the lessee for years himself. The distinction attempted is not founded in reason and justice ; for, if a person entitled in remainder after an estate for life may elect to waive the forfeiture incurred by the fine of the tenant for life, and to enter within five years after the death of tenant for life,—why may not a person entitled after a term of years do the same thing, that is, elect to treat the term as not forfeited, but still subsisting, and wait till the expiration of it ? If then he may treat the term as still subsisting for one purpose, is there any reason why he may not do so for another, and (if he can) obtain the legal interest in it, and set it up for his own benefit ? This view of the case is free from the objection made by the defendant, viz. that the term can only be held to be subsisting by treating the feoffment as fraudulent, which the administrator de bonis non cannot do for that would be to set up the fraud of the person under whom he claims.

For these reasons we are of opinion that the lessors of the plaintiff are entitled to treat the term as still subsisting as to their undivided shares of the land, and that the verdict

(a) 2 Lev. 52 ; 1 Ventr. 241.

(b) 9 Rep. 105 b.

first be entered on the third demise; and it must be entered in point of form for the whole of the land, for we do not see any principle on which the term can be divided or held to be destroyed in part, though the lessors of the plaintiff are only beneficially entitled amongst them to a moiety of the premises.

Judgment for plaintiff on the third demise.

1840.

DOE  
d.  
BLIGHT  
v.  
PETT.

DOE d. HARTWRIGHT v. FEREDAY (a).

**THIS** case was tried before Lord Abinger C. B., at the Worcester summer assizes, 1838, when a verdict was found for the plaintiff, subject to a motion to enter a nonsuit on an objection, hereafter stated, that a deed produced by the plaintiff was not properly stamped. *R. V. Richards* having obtained a rule accordingly,

A deed, conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds under the Stamp Act (55 Geo.3, c. 184), and one stamp is sufficient.

Sir F. Pollock and Busby shewed cause (b).

*R. V. Richards* and *Whateley*, in support of the rule, cited *Powell v. Edmunds* (c) and *Shipton v. Thornton* (d).

*Cur. adv. vult.*

LORD DENMAN C.J. delivered the judgment of the Court. The question in this case is, whether a deed, by which certain lands were conveyed on certain trusts, and in which a declaration of similar trusts was also made as to certain government stocks, is to be considered as two deeds for the purpose of the Stamp Act. That act affixes a stamp of 1*l.* 15*s.* on conveyances not otherwise charged, and also one of 1*l.* 15*s.* on deeds not otherwise charged. It is admitted that no ad valorem stamp is necessary, and that this instru-

(a) Decided in Easter term last (May 13th).

*Littledale, Patteson and Williams*  
Js.

(b) Before Lord Denman C. J.,

(c) 12 East, 6.

(d) 1 P. & D. 216.

1840.

DOE  
d.HARTWRIGHT  
v.

FERREDAY.

ment is not otherwise charged. We find no provision in the act, except in cases of conveyances by way of sale, that where a deed operates on several subject-matters in several ways, it shall have several stamps; and in the absence of any such provision we think that one stamp is sufficient, and that this rule must be discharged.

Rule discharged.

---



---

IN THE EXCHEQUER CHAMBER,

(ERROR FROM THE QUEEN'S BENCH,)

BEFORE

Lord ABINGER C. B.

COLTMAN J.

BOSANQUET J.

MAULE J.

ALDERSON B.

ROLFE B.

Monday,  
June 22nd.

BROOKS v. HAIGH and another.

Declaration in  
assumpsitstated that de-  
fendant made  
the promise

declared upon

in considera-

tion that plain-

tiffs, at his re-

quest, would

give up to him

a certain gua-

rantee by him

to pay 10,000*l.*

for Messrs. L.,

then held by

plaintiffs.

Averment, that

plaintiffs did

give up the

guarantee, and

that

defendant did

not perform

his promise.

Plea, that the

guarantee so

given up was

a pro-

mise to answer

for the debt

of another;

that there was

no memorandum

thereof wherein

any sufficient

consideration

ASSUMPSIT. The declaration stated that heretofore,

to wit, on the 15th March, 1837, in consideration the plain-

tiffs (below), at the request of the defendant (below), would

give up to him a certain guarantee of 10,000*l.* on behalf of

Messrs. John Lees &amp; Sons, Manchester, then held by the

plaintiffs, he, the defendant, promised the plaintiffs to see

certain bills, accepted by the said John Lees &amp; Sons, paid

at maturity, that is to say, &amp;c. The declaration then set

out three bills of exchange drawn by plaintiffs, and accepted

by plaintiffs. Averment, that plaintiffs did give up the guarantee, and that

defendant did not perform his promise. Plea, that the guarantee so given up was a pro-

mise to answer for the debt of another; that there was no memorandum thereof wherein

any sufficient consideration was stated; that the guarantee was in the following

form:—"Messrs. H. (the plaintiffs)—In consideration of your being in advance to J. in

the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for

that amount on their behalf. J. B."

Held, 1, That the words "being in advance" did not necessarily imply a past advance, and that, as the guarantee might be construed to relate to prospective advances, the giving it up was a good consideration.

2. That, even if the guarantee did relate to past advances, so as to be worthless as a pecuniary consideration, yet the mere giving up of the instrument was a good legal consideration; Maule J. dubitante, whether the pleadings shewed that the instrument itself had been given up, or whether they shewed only that the contract supposed to be contained therein had been given up.

by *Lees & Sons*, to the amount of about 10,000*l.* Averments, that plaintiffs, relying on defendant's promise, did, to wit, on &c. "give up to the said defendant the said guarantee of 10,000*l.*" Breach, nonpayment of the bills, when they became due, by *Lees & Sons* or by defendant.

Plea, that the said supposed guarantee of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise, and which guarantee was so given up to the said defendant as therein mentioned, was a special promise to answer the plaintiffs for the debt and default of the said Messrs. *John Lees & Sons*, and that no agreement in respect of the supposed guarantee or special promise, or any memorandum or note thereof, whereof any sufficient consideration for the said guarantee or special promise was stated or shewn, was in writing, and signed by the defendant or by any other person by him thereunto lawfully authorised. That the supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise, and which was so given up as therein mentioned, was contained in a certain memorandum in writing, signed by the defendant, and which was in words and figures and to the effect following, that is to say—"Manchester, 4th February, 1837. Messrs. *Haigh & Franceys*—Gentlemen—In consideration of your being in advance to Messrs. *John Lees & Sons* in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*), on that behalf. *John Brooks*." And that there was no other agreement or memorandum, or note thereof in respect or relating to the supposed guarantee or special promise. Wherefore the defendant says that the supposed guarantee, in consideration whereof the defendant made the supposed promise, is void and of no effect. Verification.

Special demurrer, on the ground that it is admitted by the plea that the memorandum, the giving of which was the consideration of the guarantee in the declaration mentioned, was actually given up to the defendant by the plain-

1840.  
BROOKS  
v.  
HAIGH.

1840.

~  
BROOKS  
v.  
HAIGH.

tiffs, and the consideration was therefore executed by the plaintiffs; and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned.

The plaintiffs (below) had obtained judgment in the Court of Queen's Bench (*a*).


Sir *J. Campbell* A. G., for the plaintiff in error, now argued, as in the Court below, that the words "being in advance," in the first guarantee, were clearly expressive of past advances, so that, it having been given on a past consideration, not alleged to have been executed at the request of the plaintiff in error, was clearly void, and that therefore the giving up of such a guarantee was no consideration for the promise on which the action was brought; that the original guarantee was so clearly bad, that the giving it up could not be considered as the giving up of a doubtful point of law, so as to form a consideration within *Stracy v. Bank of England* (*b*) and other cases; that assuming the original guarantee to be invalid, the mere giving up of a piece of written paper could form no consideration. [*Maule* J. suggested that the record did not shew that the instrument itself was given up, as "giving up the guarantee" might well mean the relinquishing the contract supposed to be contained in it.]

Sir *W. W. Follett* contended that the words "then held" shewed that the "giving up" alleged was a giving up of the instrument itself; that the original guarantee was valid; that evidence might be given of the situation of the parties, to shew that "being in advance" could not refer to past advances; that, at all events, the validity of the guarantee was sufficiently doubtful to make the surrender of it a good consideration for a promise; that, even if the guarantee were invalid, the surrender of it at the request of the defendant below was a good consideration.

(*a*) See the case reported, 2 P. & D. 477.      (*b*) 6 Bingh. 754.

Sir *J. Campbell* A. G., in reply, contended that the effect of the evidence contended for as admissible would be to vary the instrument.

*Cur. adv. vult.*

1840.  
  
 BROOKS  
 v.  
 HAIGH.

LORD ABINGER C. B., on a subsequent day in this vacation (June 29th), delivered the judgment of the Court.—In this case the judgment of the Court is to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guarantee an ambiguity which might be explained by evidence, so as to make it a valid contract, and therefore that it was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother *Maule*, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given up; and that the actual surrender of the possession of the paper by defendant was a sufficient consideration, without reference to its contents.

Judgment affirmed.

END OF TRINITY TERM.

1840.



**MICHAELMAS TERM,**  
IN  
THE FOURTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,  
Lord DENMAN C. J.                      WILLIAMS J.  
LITTLEDALE J.                              COLERIDGE J.

In the Bail Court,  
PATTESON J.

**MEMORANDUM.**

IN Trinity Vacation *William Glover*, of the Middle Temple, Esq. and *Stephen Gaselee*, of the Inner Temple, Esq., were called to the degree of the coif. The former gave rings with the motto, "*Reginâ et lege gaudet serviens*;" the latter with the motto, "*Nec temerè, nec timidè*." On the ring presented to the Queen both mottoes were inscribed.

**APOTHECARIES' COMPANY v. HARRISON.**

*November 7th.*

In debt for several penalties, it was agreed at the trial that the plaintiff should recover a verdict for one penalty only, and that the others should be given up:—

Held, that the agreement

prevented the defendant from bringing a writ of error.

**DEBT**, under the Apothecaries' Act (55 *Geo. 3*, c. 194, s. 20), to recover penalties for practising without a certificate. There were six counts, each for a separate penalty. At the trial before *Williams J.*, at the Worcester summer assizes, 1839, the parties made an arrangement that a verdict should be taken for the penalty in the first count only, and no evidence was offered on the other counts. It was also part of the arrangement that, if the defendant ceased from practice until such time as he obtained a proper cer-

ificate, no execution should issue for the penalty. The defendant afterwards sued out a writ of error.

*R. V. Richards* had, in Hilary term, obtained a rule nisi to quash the writ of error, on the ground that it was contrary to the arrangement made at the trial.

1840.

APOTHECARIES  
COMPANY

v.  
HARRISON.

*Whateley* now shewed cause, and contended that by the terms of the arrangement the defendant was not deprived of his common law right to take the judgment of a court of error. The defendant had not expressly agreed not to bring error, as in *Camden v. Edie* (a) and *Best v. Gompertz* (b). In *Wade v. Rogers* (c) the plaintiff recovered judgment by default, and signed final judgment: the defendant brought a writ of error in the King's Bench; but (there being no bail in the action below) the plaintiff brought his action of debt on the judgment, and held the defendant to bail: there was a rule by consent to stay the proceedings in the second action on the defendant's giving judgment, with a stay of execution till the writ of error should be determined. In the same term the original judgment was affirmed, and the defendant then brought a new writ of error on the second judgment. The Court decided that no such consent (not to bring a writ of error) was implied in the rule, and that it should be expressed in such cases. In *Brown v. Lord Granville* (d) the attornies of the parties agreed to be bound by the judgment of the Court on demurrer; and it was held that neither party could bring a writ of error on that judgment. But there was no such agreement in this case. A party will not be prevented from bringing error, except where circumstances render it contrary to good faith or express agreement.

*R. V. Richards* contra. In *Cave v. Masey* (e), where the defendant obtained time to plead on the terms of giving judgment of the term, and afterwards brought a writ of

(a) 1 H. Bl. 21.


(b) 2 D. P. C. 395.

(c) 2 W. Bl. 780.

(d) 2 D. P. C. 796.

(e) 3 B. &amp; C. 735; S. C. 5 D. &amp; R. 624.



1840.  
  
 APOTHECARIES'  
 COMPANY  
 v.  
 HARRISON.

error, which was quashed by the Court, it was held that the judgment must mean an available judgment. In the present case the plaintiffs gave up their right to recover on numerous counts, and the defendant consented to the verdict on the first count on the ground that the plaintiffs would not seek to issue execution. The plaintiffs are not now seeking to do so; but the attempt to set aside the verdict is clearly against good faith.

Lord DENMAN C.J.—It is impossible to look at the agreement, and not see that the meaning of the parties was that the verdict should be final. It was understood by both parties that it should not be contested; otherwise the plaintiff would not have given up his right to recover the penalties on the other counts. Therefore the writ of error cannot be looked upon otherwise than as a breach of good faith.

LITTLEDALE, COLERIDGE and WILLIAMS Js. concurred.

Rule absolute.



Nov. 16th,

The QUEEN v. The Mayor, &c. of CAMBRIDGE.

In the year 1833 *H.* was elected town clerk to the corporation of *C.* *quamdiu bene se gesserit.* He remained in office up to the 1st Jan. 1836, but neglected to make the declaration required by 9 *Geo.* 4, c. 17. On the 1st Jan. the new town council of *C.* removed him from his office, under the provisions of the Municipal Corporation Act:—Held, that he was entitled to compensation under the 66th section.

MANDAMUS to the mayor, &c. of the borough of Cambridge, reciting that one *Charles Pestell Harris*, at the time of the passing of the Municipal Corporation Act, was town clerk of the said borough, and that on the 1st of January, 1836, he was removed from the said office by the town council elected under the said act, and that he was entitled to have an adequate compensation, to be assessed by the council and paid out of the borough fund, for the fees and emoluments of such office, and that on the 29th of March in the said year he preferred his claim for such

m of 197l. 17s. per annum for life, as a compensa-  
the salary, &c. of the said office, and that the sum  
ed ought to be secured to him by bond under the  
re corporation of the said borough, and that such  
d been demanded by him of the said mayor, &c.  
sed by them, and commanding the said mayor, &c.  
te such bond.

etern stated that the said *C. P. Harris* was not at  
of the passing of the said act, &c. an officer of the  
ough, according to the true intent and meaning of  
act.

by the said *C. P. Harris* that before the passing  
aid act, to wit, on the 16th June, 1830, the said  
*Harris* was duly elected by the mayor, &c. of the  
ough to the office of town clerk of the said bo-  
o continue in the said office until the 24th August,  
d was duly admitted and took the several oaths,  
e and subscribed the declaration required by law  
ehalf, and that on the 16th August, 1831, he was  
ily elected town clerk for the ensuing year, com-  
on the 24th August then next, and took the seve-  
, &c.; and that on the 16th August, 1832, he was  
ected for the ensuing year from the 24th August  
t., and took the said oaths, &c.; and that before the  
of that year to wit on the 16th August 1832 it

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

resolution), and that the said *Harris* continually from the time of such appointment until he was removed from the said office by the said council as thereafter mentioned, executed and performed the duties of the said office, and received a certain salary, and held and enjoyed all the fees, &c. belonging to the said office, and had the custody of divers deeds, &c. belonging to the said mayor, &c., and that after the passing of the said act, to wit, on the 1st January, 1836, the council of the said borough, acting in pursuance of the powers given to them by the said act, removed him from the said office, and that upon such removal he delivered up to the said council all such deeds, &c., and then ceased to receive the said annual salary, &c.; concluding with a prayer of judgment and for a peremptory mandamus.

Replication, by the mayor, &c. that the said *C. P. Harris* did not within one calendar month next before, or upon or at any time after the making of the said resolution of the said mayor, &c. on the 16th August, 1833, or within one calendar month next before or upon, &c. the appointing of the said *Harris* to be town clerk of the said borough, on the 24th August, 1833, or within one calendar month next before, &c. his admission into the said alleged office, take the several oaths by law required to be by him taken in that behalf, or any or either of them, or make or subscribe the declaration required by the 9 *Geo.* 4, c. 17, and that for the cause aforesaid the said *Harris* was not at the time of the passing of the 5 & 6 *Will.* 4, c. 76, an officer of the said borough within the meaning of that act; concluding with a verification.

Demurrer, and joinder.

Sir *W. W. Follett*, in support of the demurrer. The question whether *Harris* is entitled to compensation, turns on the 66th sect. of the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76. He was first elected on the 16th June, 1830, to hold the office for a year; he was again elected in

1831, and also in 1832, and after each election he took the necessary oaths and subscribed the declaration. The objection now raised against his claim to compensation is, that after he was elected in 1833 during good behaviour, he ought to have repeated the oaths and subscribed the declaration required by the stat. 9 Geo. 4, c. 17, and that, having neglected to do so, he might at any time have been removed by quo warranto, and that he was therefore not legally an officer of the corporation at the time of the passing of the Municipal Corporation Act. The first question arises on the meaning of the compensation clause in the Municipal Corporation Act, which enacts "that every officer of any borough who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office under the provisions of this act, shall be entitled to have an adequate compensation, to be assessed by the council and paid out of the borough fund, &c. for the salary, &c. of the office which he shall so cease to hold." There has been an appeal to the Lords of the Treasury, and they have decided that he was entitled to compensation. It is not contended that the decision is of necessity binding unless the party is really entitled: but, to render him so, actual possession of the office is sufficient, and no defect in the tenure of the office will incapacitate him from receiving compensation. Suppose the case of a corporate officer, at whose election there had been an improper president, that would not be a sufficient answer to his claim. The new corporation did not, as shewn by their conduct towards him, consider *Harris* as not an officer: on the contrary, they actually removed him. The case of *Rex v. Bridgewater* (a) shews that the word "officer" is not used in a strict legal sense in the 66th section of the Municipal Corporation Act. Even allowing that there was a defect in the election of *Harris*, which would subject him to a quo

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

(a) 1 N. &amp; P. 466.

1840.

*The QUEEN*  
v.  
*The Mayor,*  
&c. of  
CAMBRIDGE.

warranto, still that would not be an answer to his claim for compensation under this statute; and, after the lapse of six months, a quo warranto would not have lain. The old law as to oaths to be taken by corporate officers has been altered by various statutes, and may be considered obsolete. Again; the Annual Indemnity Act cures every omission in this respect. By the Corporation Act, 13 *Car. 2*, st. 2, c. 1, and the Test Act, 25 *Car. 2*, c. 2, corporate officers were required to take certain oaths, and also to receive the sacrament prior to their election; but by the 5 *Geo. 1*, c. 6, the omission to do so could not be questioned after the lapse of six months. That act is not repealed by the 9 *Geo. 4*, which enacts that a declaration shall be made in lieu of the sacramental test; but there is no provision as to the time within which an objection should be taken for non-compliance with its provisions. The 5 *Geo. 1* therefore remains in force; and, if the title of a party is sought to be questioned, it can only be done by quo warranto information within six months of his election. But the 1st section of the 5 & 6 *Will. 4*, c. 11 (the Annual Indemnity Act, passed the same year as the Municipal Corporation Act), would cure the informality. That section is as follows. After reciting that divers persons who on account of their offices, &c. ought to have taken and subscribed the oaths, &c. or assurance appointed to be taken and subscribed (by various statutes therein mentioned), have, through ignorance of the law, absence, or some unavoidable accident, omitted to take and subscribe the oaths and assurance, and make and subscribe the declaration required by the said acts or either of them, within such time as in and by the said acts is required, it enacts, "that all persons who shall have omitted to take and subscribe the oaths and declarations within such time as in and by the said acts or any of them is required, and who, on or before the 25th of March, 1836, shall take and subscribe the oaths, declarations, &c. in such cases wherein by the said several acts, or any or either of them, the said oaths, decla-

rations, &c. ought to have been taken and subscribed, shall be indemnified, freed and discharged from and against all penalties, forfeitures, incapacities and disabilities, incurred by reason of any neglect or omission of taking or subscribing the said oaths, &c. or making and subscribing the said declarations, &c., and such persons shall be fully recapitulated and restored to the same state and condition as they were in before such neglect or omission, and shall be deemed to have duly qualified themselves, &c.; and all elections of and acts done by such persons shall be of the same force and validity as the same would have been if such persons had taken the said oaths, &c. and made and subscribed the said declarations, according to the directions of the said acts." Then, with regard to the construction of the Municipal Corporation Act: at the time that act passed, *Harris* had full possession of the office. Besides, when he was originally appointed, he took the oaths required; and there is no authority to shew that, where the tenure of office has been enlarged only, the oaths taken at the commencement are not sufficient, or that a repetition of them is necessary.

*Kelly* contra. There are two questions in this case; the most important one is, whether at the time the Municipal Corporation Act passed, *Harris* was *de jure* in possession of the office, or whether his election was not absolutely void. The second question is, whether, supposing the election void, he is entitled to compensation under section 56 of that act; and that will depend upon whether any person *de facto* exercising an office would be entitled to compensation, although in point of law he might be a usurper.

The argument raised on the other side appears to be this, that *Harris*, having once held an office *de jure*, his continuance in an enlarged and different office would relate to his original appointment. [Lord *Denman* C. J. Nothing will turn upon that point.] Then the question is, whether, not having subscribed the declaration required by the 9 *Geo.* 4,

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

1840.

  
The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

he was ever *de jure* an officer. It is true that the former statutes (except the 5 Geo. 1) are repealed by the 9 Geo. 4; the law therefore is to be looked for within the four corners of 9 Geo. 4; and by section 4, the election of an officer is expressly declared to be void if the party omits to make the declaration required by section 2(a); and the act does not even stop at the word "void," but further says, that "it shall not be lawful for such person to do any act in the execution of the office into which he shall be so elected;" how then can it be contended that, after a wilful default in not complying with the statute, the Indemnity Act can have any operation? The statute 9 Geo. 4 cannot be considered a dead letter, as it has been expressly decided in *Humphery v. Reg. (b)*, by the Court of Exchequer Chamber, that non compliance with that act renders the election void. Besides, by the Indemnity Act the legislature has given relief only on certain conditions; therefore the further question arises, have these conditions been complied with in this case? The statute recites certain cases where persons have, "through ignorance of law, absence or some unavoidable accident," omitted to make the declaration. Now it cannot be pretended that Mr. *Harris* falls within any of the cases mentioned, and they cannot be extended; the indemnity is also conditional upon the party's making the required declaration within a certain time; but even this has not been done by Mr. *Harris*. It may be said that he lost his office in January, 1836, and therefore was deprived by the defendants of the chance given by the act of making the declaration before the 25th March. Where, however, an election is void in law, but the legislature has given a *locus penitentiæ*, if the officer should die before the term allowed,

(a) The words of section 4 are, "That if any person placed, elected or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election or

choice shall be void; and that it shall not be lawful for such person to do any act in execution of the office or place into which he shall be so chosen, elected or placed."

(b) 2 P. & D. 691.

would the Court say that the void election was cured? The case of his removal stands on the same footing. Besides, *Harris* continued three years in the office, and never availed himself of the opportunity of curing the defect, under the annual Indemnity Act; he cannot therefore be allowed now to say that he would have availed himself of it if he had not been removed. The Indemnity Act passed on the 3d July, 1835, the Municipal Corporation Act on the 9th September, 1835, therefore *Harris* had warning, and many months, to avail himself of the provision in his favour. The election to the office therefore was wholly void; the condition, by which it is contended the objection might have been cured, has not been complied with; consequently *Harris* was not town clerk *de jure* at the time of the passing of the Municipal Corporation Act, and he was removed at the very first possible moment. The only question which remains to be considered is, whether the word "officer" means the person clothed with the office legally or only *de facto*; that the former is the correct construction appears both from the words and intent of the 66th section. Suppose (as frequently happens) there had been two elections, and that the party who was not legally elected obtained possession of the papers and exercised the office *de facto*, the other party being elected *de jure*, and then this act were passed; assuming the election of the party in possession to be void, and that of the other good, which would be entitled to compensation? [*Littledale J.* Suppose both had conformed with the condition of the Indemnity Act, the same difficulty would arise.] The difficulty would not arise if the Court decided that the party elected *de jure* was entitled. The act does not say "any person who shall exercise an office," but "any officer in any office of profit;" that must mean *legally* in such office: mere election is not sufficient; the statute requires a compliance with every act which shall be necessary to give investiture. If an action were brought by *Harris* for money had and received for the fees of the office, it would not be enough for him merely

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.



1340.

The QUEEN  
 v.  
 The Mayor,  
 &c. of  
 CAMBRIDGE.

to shew that he was in the office *de facto*, at least it would be an answer to shew that his election was void. The remaining words of the statute point out the principle on which the compensation is founded, "regard being had to his term or interest therein;" but here *Harris* had no interest whatever. *Rex v. Bridgewater* (a) only shews that the Court will not limit the word "officer" to the old common law officers, but will put a liberal construction on the act; and *Reg. v. Corporation of Poole* (b) shews that, where a party does not bring himself within the legal term "officer," the Court will not give compensation.

Sir W. W. Follett in reply. *Rex v. Parry* (c) shews that, if a party elected to an office, unintentionally omits to take the oaths, he may still take advantage of the provisions of the Indemnity Act, and that in such a case his election is made valid from the beginning. Assuming the election was void, it cannot be denied that to make it good the declaration should have been made, but if the party failed to make it within one year, under one Indemnity Act, and then a second Indemnity Act passed, a declaration subsequently made would relate back to the first election. It has been argued on the other side that *Harris* had no estate or interest, but by the Indemnity Act he had, or might have had; for by taking the declaration at any time before the 25th of March, 1836, he would have had an estate for life; by his removal he was prevented from availing himself of the provisions of the act and perfecting his title. [Lord Denman C. J. The words of the Indemnity Act are certainly very descriptive, enumerating "absence, accident and ignorance of law," but I am not aware of any case in which those contingencies were proved.] According to the argument on the other side, if *Harris* had been in office for thirty years, and had omitted to make the declaration, he would not be entitled to compensation; and in an action for money had and

(a) 1 N. &amp; P. 466.

&amp; P. 119.

(b) 7 A. &amp; E. 730; S. C. 3 N.

(c) 14 East, 549.

received, he would not be entitled to his fees. *Reg. v. Poole*(a) was different from this case; the officer there was appointed under a private act of parliament; here *Harris* has received the emoluments from the corporation.

1840.  
  
 The QUEEN  
 v.  
 The Mayor,  
 &c. of  
 CAMBRIDGE.

Lord DENMAN C. J.—This is a return to a mandamus, by which the corporation of Cambridge is called upon to make compensation to Mr. *Harris*, late town clerk. The Municipal Corporation Act gave power to the new corporations to remove the old officers without cause, supposing that they might not act cordially with the new corporations; this is followed by a provision, consistent with common justice, that compensation should be given to them, unless the removal was justified by the old law. The question here arises from the following facts: Mr. *Harris* was removed, having filled the office in fact, but not having conformed to the provisions of the 9 *Geo.* 4, c. 17; but there was another act also in force, which in some degree qualified the 9 *Geo.* 4, namely, the Indemnity Act. If the provisions contained in these two acts had been found in the same statute, it would certainly have been strange; however they were coexistent, and by the operation of the Indemnity Act, Mr. *Harris* had, until the 25th of March, to make the declaration required by the 9 *Geo.* 4. However, my judgment is not grounded on that; for I think he could not have been removed from his office except by a *quo warranto*, and the *quo warranto* should have been sued out within a given time; that proceeding would have been quite consistent with the declaration that he was not an officer of the corporation; but the new town council removed him without any cause. Mr. *Harris* therefore was an officer de facto, and that perhaps was all that was required by the Municipal Corporation Act. The act 9 *Geo.* 4 does not apply, for whatever was the defect in *Harris's* title, he could only be removed by a *quo warranto*, he was therefore an officer of the corporation de facto at the time of the passing of the

(a) 7 A. & E. 730; S. C. 3 N. & P. 119.

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

Municipal Corporation Act, which, on removal, gave him compensation; he was afterwards removed by the new corporation, and that was all that was necessary under the provisions of the act to entitle him to compensation.

LITLEDALE J.—I am of the same opinion. *Mr. Harris* was in an office of profit within the 66th section, at the time the Municipal Corporation Act passed, and was removed. The corporation do not deny that he was removed by them; it is admitted that he was legally in office up to the year 1833, and in an office of profit, but they contend that having omitted to make the declaration required by the 2d section of the 9 Geo. 4 he was not legally in office after that period; that the provision as to officers in offices of profit, and in the receipt of profits, applies only to persons rightfully in receipt of profits; but I am disposed to think that *Mr. Harris* held the office legally, until removed by a quo warranto. It was competent for the corporation to have called upon him to shew cause why he should not be removed, but neither course was adopted; the corporation have removed him from his office under the new act, and without reference to any informality in his election. The removal took place on the 1st of January, 1836, but the Indemnity Act allowed him until the 25th March following to make the declaration, and therefore at the time of his removal he had it in his power to rectify his title, and although, had the Indemnity Act not passed, he might not have been able to acquire a legal title to the office, yet in point of fact he was practically in the office, and was removed solely in consequence of the passing of the Municipal Corporation Act, and being in an office of profit he has established his claim to compensation.

WILLIAMS J.—The question lies in a narrow compass; whether *Mr. Harris* was, at the passing of the act, an officer within the meaning of its provisions; he had been regularly elected by the corporation, and was in the perception of the

profits, and was then removed by the act of the new corporation, which act of itself implies that the corporation treated him as in possession. Such was his actual position. There is no doubt that the corporation might have taken steps to dismiss him for his omission to make the declaration, but, if that objection had been raised by the corporation, he was in a condition to have removed it under the Indemnity Act, and then he would have been an officer not only *de facto*, but his title would have been unimpeachable *de jure*. As the corporation have not taken that course, I think, as respects compensation, they cannot deny the sufficiency of his claim.

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

COLERIDGE J.—I agree with my brother *Williams* that the case lies in a very narrow compass; it turns upon section 66 of the Municipal Corporation Act. According to my view of the case, it is not necessary to pray in aid the Indemnity Act. The case stands thus, Mr. *Harris* was elected to the office by the old corporation in 1833; he entered and performed the duties, and continued in possession down to January, 1836. During that period he had neglected to subscribe the declaration required by the 9 Geo. 4, but he held the office *de facto*, and he could have made the declaration at any time, but I do not rely on that; then, in the year 1836, he was removed. The words of the act 9 Geo. 4 are strong, but Mr. *Harris* was certainly an officer; he was not a stranger to the corporation; it would have been necessary to remove him by a *quo warranto*. The case of *Humphery v. Reg. (a)* is clearly distinguishable from the present. In that case Mr. *Salomons* was never admitted to the office, and therefore a *quo warranto* was not necessary to remove him. In this case *Harris* was in the possession of the office, although he held it by a defeasible title, and consequently was an officer of the corporation; for I cannot agree in the opinion that the act meant that titles should be entered into and examined. I think that

(a) 2 P. &amp; D. 691.

1840.

The QUEEN  
v.  
The Mayor,  
&c. of  
CAMBRIDGE.

possession of the office and removal by the new corporation are sufficient to entitle a party to compensation under the act.

Judgment for the crown.

Tuesday,  
November 3d.

ELLIOTT v. KENDRICK.

The plaintiff, before action brought, had assigned his property to trustees, in trust for the benefit of his creditors, and had also become both insolvent and bankrupt. The trustees brought an action in his name:—Held, that the defendant was entitled to security for costs.

A RULE had been obtained, calling upon *W. Nichol and D. Scott* to shew cause why they should not give security to the defendant for costs, upon affidavits stating the following facts:—In 1837 the plaintiff, to whom the defendant was then alleged to be indebted in the sum in question, executed a deed of assignment of all his property to Messrs. *Nichol and Scott*, in trust for the benefit of his creditors. In 1838, but before action brought, he took the benefit of the Insolvent Act, and shortly afterwards in the same year, and also before action brought, was declared a bankrupt. The present action had been commenced by Messrs. *Nichol and Scott*, under the usual power of attorney contained in the trust deed, in the plaintiff's name. The plaintiff had remonstrated against bringing the action, and had himself also called upon the trustees for an indemnity against the costs.

*Platt* shewed cause.

*Humfrey*, contra, referred to *Heaford v. Knight* (a) and *Doyle v. Anderson* (b).

Per CURIAM (c)—

Rule absolute.

(a) 2 B. & C. 579; 4 D. & R. 81.  
(b) 2 D. P. C. 596.

(c) Lord Denman C. J., *Little-  
dale, Williams and Coleridge* Js.

1840.

OLDERSHAW v. HOLT and another, Executors of C.  
FREWIN, deceased.

*Tuesday,  
November 3rd.*

**D**ECLARATION, that by a certain agreement in writing made on the 13th April, 1836, by and between the plaintiff and the deceased, it was agreed, amongst other things, that the plaintiff should and would upon the request and at the costs of the said C. F. &c. when and so soon as the messuages and buildings in the said agreement covenanted to be built should be completed, grant unto the said C. F. or his executors &c. by one or more leases, two pieces of land, one piece of which was situate on the Grand Junction road, in the parish of Paddington &c. to hold the said piece of land for the term of 98 years, wanting five days, from the 25th day of December then last past, at a pepper corn rent for the first three years of the said term, and at the yearly rent of 115*l.* for the remainder of the said term, and that if more than one lease should be required of the said piece of ground, such yearly sum should be fairly apportioned, and be payable quarterly in equal portions, and to be net payments free from any deductions. And the said C. F. then agreed with the plaintiff that he would on or before the 25th December, 1841, at his own costs build and cover in upon the said piece of ground fourteen second-rate messuages, *i. e.* four on or before the 25th December, 1837; four more on or before the 25th December, 1838; and the remaining six on or before the 25th December, 1841; and the said C. F. his executors &c. should take such lease or leases under and subject to the terms and conditions in the said agreement referred to, and execute counterparts thereof, and until the said piece of ground and the buildings to be erected thereon should be leased, was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of the stat. 4 & 5 *Wil.* 4, c. 22.

*A.*, in 1836, let certain land to *B.* under a building agreement; the rent was to commence at Christmas, 1838, and *A.* to have a right of re-entry in case of non-performance on the part of *B.* *A.* availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st of January, 1839. In Sept. 1838, he had re-let the land to *C.*, at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement:— In an action by *A.* for breaking the first agreement, held, first, that the demise in the ejectment, was to be taken as the date of the re-entry by *A.*; and that he

2. That it was properly left to the jury, as a mere money calculation, to say whether *A.* had sustained more than nominal damages by the breaking the agreement.

1840.

OLDERSHAW

v.

HOLT.

he the said *C. F.* should pay for the same, or so much thereof as should remain unleased, the rents in the said agreement agreed to be reserved in the manner to have been regulated by the said leases; and in the mean time, until the granting of such lease or leases, to perform and keep all the contracts and agreements in the said agreement stipulated and agreed to be inserted in such lease or leases on the part of the lessees, in like manner as he would be bound to do if such lease or leases had been actually granted to him, so far as the nature of the case would admit the fulfilment thereof. And it was further agreed, that before any lease or leases should be granted, there should be standing on the said piece of ground one messuage undemised as a security for the fulfilment of the agreement on the part of the said *C. F. &c.* And it was also further agreed, that in case any part of the said rents should be in arrear for twenty-one days after they become due, or in case of the non-performance by the said *C. F. &c.* of the agreement referred to, then in any or either of the said cases it should be lawful for the plaintiff to re-enter on the said premises thereby agreed to be leased, freed and discharged from the said agreement, and all right and interest of the said *C. F. &c.* at law or in equity, without prejudice to the recovery of any arrear of such yearly rent which should remain due and unsatisfied.

Averment of mutual promises; and although the plaintiff was at all times ready and willing, on the request and at the costs of the said *C. F.* and as soon as the messuages had been completed, to grant unto the said *C. F.*, by one or more leases, the said piece of ground on the terms stipulated in the said agreement; yet the said *C. F.* did not at his own costs erect or cover in or upon the said piece of ground four second-rate messuages on or before the 25th December, 1837, nor four more on or before the 25th December, 1838, but wholly neglected and refused so to do, and never hath built any, nor were there then built upon the said pieces of land any of such messuages so agreed to

1840.

OLDERSHAW

v.

HOLT.

have been built, nor was there any house undemised as a further security for the fulfilment of the said agreement by the said *C. F.*, and that, although the said piece of ground hath not hitherto been leased, yet neither the said *C. F.* in his lifetime, nor the defendants as executors since his death, have paid the said yearly rent or rents agreed to have been reserved and to have been paid to the said plaintiff, but have wholly failed and made default, and there is now due and in arrear, in respect of such rents of the said piece of ground, a large sum of money, to wit, the sum of 200*l.* whereby and by reason of the said breaches of the agreement, the plaintiff hath wholly lost the benefit and advantage, together with divers large gains and advantages that he would have derived from disposing of the said ground and leases so to have been granted, if the said *C. F.* had performed his agreement, and also by reason of the said piece of ground remaining unbuilt upon, and the sum which would have accrued to the plaintiff for the remainder of the said term, to wit, the annual rent of 115*l.* accruing from the 25th December, 1838, and hath also been put to great expense, to wit, of 100*l.* in entering into another agreement for building upon the said piece of ground, and the plaintiff hath lost the rental for the said piece of ground for five years from the 25th December, 1838, &c.

Pleas: first, as far as relates to the non-payment of the money rents, that before any breach of promise in regard to the payment of such money rents, and before the amount mentioned to be due and in arrear in respect of such rents did or could become due, the said *C. F.* broke his agreement in this that he did not at his own costs erect or build on the said piece of ground four second-rate messuages on or before the 25th December, 1837, nor four more before the 25th December, 1838, and committed all the breaches of agreement mentioned to which the pleas are not pleaded, whereby the said *C. F.* forfeited all right and interest in the said piece of ground, and the plaintiff became entitled to re-enter on the same; and that before any such default



1341.  
—  
1342.  
7.  
1343.

or breach of promise as in the declaration mentioned and alleged to have been committed in respect of the said money rents, and before the amount in the declaration mentioned to be due and in arrear in respect thereof could or did become due, the plaintiff re-entered upon all the said premises, and had again all the estate and interest of the said C. F., and of the said defendants as his executors, whereupon their interest ceased and was determined. Verification.

Second, as to the residue of the said breaches of promise, payment into Court of forty shillings.

Replication. First, that the sum of money alleged in the declaration to have become due had become due before the re-entry by the plaintiff.

Second, that the plaintiff had sustained damages to a greater amount than the sum of forty shillings.

The case was tried before Lord *Denman* C. J. at Guildhall in the sittings after last Trinity term, when the agreement was proved as stated in the declaration; and the following facts were also given in evidence. C. F. died in 1837, and in consequence of his not having performed the agreement the plaintiff brought ejectment against his executors, the present defendants, upon two demises, the first of which was laid on the 1st January, 1839; but the plaintiff did not take possession till the following 12th June. In September, 1838, a fresh building agreement as to the same premises had been entered into between the plaintiff and other parties, under which the rent was to commence at Midsummer, 1840, consisting of 70*l.* for the first year, and 140*l.* per annum for the residue of the term. His lordship told the jury that he was of opinion that the period of the plaintiff's re-entry upon the premises must be taken to have been at the date of the first demise in the ejectment, and that no rent had become due under the agreement at that time; and that the question upon the second issue was merely a money question, which his lordship left to the jury to say whether, taking the new agree-

ment into consideration, the plaintiff had sustained any special damage. The jury found a verdict for the defendants.

1840.

OLDERSHAW

v.

HOLT.

*Warren* now moved for a new trial, upon the ground of misdirection; or to enter a verdict for the plaintiff pursuant to leave reserved.

First, this was a case in which the plaintiff was entitled to an apportionment of the rent under the provisions of the 4 & 5 Will. 4, c. 22, s. 2, which enacts that "all rents &c. payable at fixed periods shall be apportioned in such manner, that on the death of any person interested in such rents &c., or on the determination by any other means whatsoever of the interest of such person, he shall be entitled to a portion of such rents &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his interest, all just deductions being made, and every such person shall have the same remedies for recovering such apportioned parts of the said rents &c. when the entire portion, of which such apportioned parts shall form part, shall become due and not before, as he would have had for recovering such entire rents &c. if entitled thereto, but so that the person liable to pay the rents &c., reserved by any lease &c., and the lands &c. comprised therein, shall not be resorted to for such apportioned parts specifically, but the entire rents &c.. of which such portions shall form a part, shall be received by the person who, if this act had not passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person by the parties entitled to the same under this act." The rent in this case commenced from the 25th December, 1838, and without disputing the rule laid down by the Lord Chief Justice at the trial, that the re-entry by the plaintiff must be taken to have occurred on the day of the first demise in the ejectment, viz. on the 1st January, 1839, the plaintiff

1840.

OLDERSHAW  
v.  
HOLT.

under the statute would be entitled to the portion of rent in respect of the period between these two days.

Secondly, the plaintiff was entitled to damages upon the calculation of the rent that ought to have been paid by the defendants from December, 1838, to Midsummer, 1840, when the rent was to commence from the new tenant; the right of action had vested in the plaintiff, and there had been neither release nor accord and satisfaction; *Willoughby v. Backhouse* (a).

LORD DENMAN C. J.—With regard to the point raised as to the apportionment of the rent, the answer is, that there was no breach of the covenant to pay the rent, which was reserved quarterly.

LITLEDALE J.—As to the small portion of the rent between the 25th December, 1838, and the 1st of January, 1839, I quite agree. The defendants might have been treated as wrongdoers after the latter day, and the plaintiff would have been entitled to an action for mesne profits from that period; but he could not claim any rent till Lady-Day, 1839, nor is he entitled to apportion the rent under the statute of 7 Will. 4, which I do not think applies to such a case as the present.

WILLIAMS J.—I am of the same opinion. Upon the other part of the case, the jury have found that 40s. were sufficient to cover the damages sustained by the plaintiff for the breaking the contract, and I see no reason to disturb their verdict.

Then as to the other point, the plea seems to me to be fully made out, that no rent had become due at the time of the re-entry by the plaintiff. I concur in the doubt that has been expressed by my brother *Littledale* as to whether the act relating to the apportionment of rents can apply to a

(a) 2 B. & C. 821; S. C. 4 D. & R. 539.

case of this kind, where the term has been put an end to by the party's own act.

1840.

OLDERSHAW  
v.  
HOLT.

COLERIDGE J.—On the first point I am of opinion that the Lord Chief Justice was quite right in saying, in effect, that the rent ceased from the day of the demise in the declaration. Then as to the small portion that is claimed under the act for the apportionment of rents, it seems to me that, with reference to the issue, the second section does not apply at all in this case. It only applies where the rent still remains, but is to be apportioned between two parties; for it says, that the person who is to have the portion of the rent is to recover the same “when the entire portion, of which such apportioned parts shall form part, shall become due, and not before;” and from whom is he to recover it? from the person who has received the entire rents, so that “the person liable to pay the rents shall not be resorted to for such apportioned parts.” Besides, I quite agree that this act cannot apply to a person who has chosen to come in and determine his right to receive rent.

Rule refused.

BENNETT, Executor of BARKER, deceased, v. BURTON.

Tuesday,  
Nov. 10th.

COVENANT. The action was tried before Lord Denman C. J. at the sittings after Hilary term, 1839, when a verdict was found for the plaintiff on the issue arising from the second breach of the covenant, damages 127*l.* 2*s.* 6*d.*: and for the defendant on the other issue, with liberty to the defendant to move to have a verdict entered for him on the issue as to the second breach: and on application for that purpose, the Court directed that a special case should be stated.

The defendant, in a mortgage to the plaintiff, covenanted to insure his life, and to pay the annual premiums on the policy, and in case of default that he would repay such sums as should be paid by the

plaintiff by way of premiums. The defendant insured his life, and was afterwards discharged under the Insolvent Act:—Held, that the defendant was still liable, on the covenant, for premiums paid by the plaintiff after defendant's discharge.

1841.  
 ~~~~~  
 BAKER  
 v.  
 BAKER

The declaration was on a mortgage deed, dated the 1st of August, 1831, between the defendant of the one part, and Samuel Barker (the plaintiff's testator) of the other part, for securing a loan of 1000*l.* and interest at five per cent., from the testator to the defendant. The defendant covenanted (amongst other things) that he would, at his own expense, with all convenient speed after the execution of the indenture, by way of further security for the repayment of the said sum of 1000*l.* and interest, insure, or cause to be insured, his life in some good and sufficient office of insurance in Manchester for the sum of 1000*l.* with interest, and would cause a proper memorandum to be made upon the policy, so as to entitle S. B. to the benefit thereof; and that he (the defendant) would deliver the policy to S. B., and further that, if at any time or times, whilst any money should remain due and owing on the security of the said indenture, he, the defendant, should neglect or refuse to effect or keep on foot such insurance as aforesaid, or to deliver to S. B. his executors &c., upon reasonable demand, the receipts for the annual premiums payable in respect thereof, then and in such case it should and might be lawful for S. B., his executors &c., to effect and keep on foot, either in his name or in the name of defendant, his heirs &c. such insurance to the amount aforesaid, and to pay all such annual premiums, or other sums of money as should be necessary and proper for that purpose, and that he the defendant, his heirs &c. should and would well and truly repay unto S. B., his executors &c. upon demand, all such sums of money as he or they should so pay or advance in respect of such insurance or insurances as aforesaid with interest for the same respectively after the rate aforesaid, from the respective times of the same being paid or advanced; and that in case the defendant, his heirs &c., should neglect or refuse to pay the same upon such demand being made as aforesaid, then that the same should be recoverable by an action at law against the defendant as and for liquidated damages. The second breach was, that


though there still remained due and owing upon the security of the said indenture a large sum of money, to wit &c., and although the defendant did, under and by virtue of and according to the said indenture as a further security to S. B., his heirs &c., for the repayment of the said sum of 1000*l.* and interest, effect a certain insurance on his life in a certain insurance office, to wit, on &c. in the Norwich Union Life Insurance Society in the sum of 1000*l.*, the policy of which insurance bore date the day and year last aforesaid, and the annual premium upon which said policy was and amounted to the sum of 30*l.* 5*s.*, yet the defendant did not nor would keep and continue his life so insured at all times until full payment of the said principal sum of 1000*l.* and interest, but on the contrary thereof had thence wholly neglected and refused so to do and had for divers, to wit, seven years then last past, wholly neglected and refused to keep or continue his life insured in any manner whatsoever according to his covenant in that behalf, nor had the defendant at any time since the making of the said indenture delivered to S. B. in his lifetime, or to the plaintiff since the death of S. B., any receipt or receipts whatsoever for the annual premiums payable in respect of the said insurance, although divers, to wit, seven annual premiums had become payable in respect of the said insurance since the said insurance was so effected as aforesaid, and although reasonable demand in that behalf had from time to time been made to the defendant, to wit, by S. B. in his lifetime, and by the plaintiff as such executor as aforesaid since &c. to wit, on &c. And, further, that although S. B. in his lifetime did, from time to time, keep on foot such insurance so effected as aforesaid, and the plaintiff as such executor as aforesaid had from time to time, since the death of S. B., continually kept the same on foot in manner aforesaid, and S. B. in his lifetime for a certain long space of time, to wit, for the space of five years, did, under and by virtue of and according to the said indenture, duly pay to the said insurance office the annual premiums which had become necessary

1840.

BENNETT

v.

BURTON.

1840.  
  
 BENNETT  
 v.  
 BURTON.

and payable upon the said insurance and policy, amounting in the whole to a large sum of money, to wit, 250*l.*, and the plaintiff as such executor, from the time of the death of *S. B.*, paid to the said insurance office last mentioned divers sums of money, which had become necessary and payable to the said office, upon and by reason of the said insurance and policy for and during the time last aforesaid, amounting in the whole to a large sum of money, to wit, 250*l.* all of which premises &c., and which said sums of money so respectively paid as thereinbefore stated were after such payments aforesaid and before the commencement of the suit, to wit, on &c., demanded of the defendant according to the tenor and effect of the said indenture and policy, to wit, by *S. B.* in his lifetime and by the plaintiff as such executor as aforesaid since the death of *S. B.*, yet the plaintiff in fact said, that the defendant had not at any time repaid the said sums of money so as aforesaid respectively paid for the purpose of keeping on foot the said policy or any part thereof.

Pleas:—1st, As to so much and such of the breaches and causes of action in the declaration mentioned as related to the non-payment by the defendant of the monies therein mentioned, that theretofore, to wit, on the 18th June, 1834, by a certain order then made by the Court for the Relief of Insolvent Debtors in England, the defendant then being an insolvent debtor in actual custody and a prisoner, to wit, in the Fleet prison, was duly discharged according to a certain act (7 Geo. 4, c. 57), of and from the said debt and monies and causes of action in the declaration and in the introductory part of that plea mentioned and each of them, which said order remained in full force. Verification.

Replication to the first plea: That the defendant was not by the said order in the said plea mentioned duly discharged according to the said statute of and from the said debts and monies and causes of action in the declaration, and in the introductory part of the said plea mentioned *modo et forma*.

After the execution of the mortgage deed, and after effecting the policy of insurance mentioned in the pleadings, but before the death of Mr. *Barker* the mortgagee, to wit, on the 18th June, 1834, the defendant was discharged by an order of the Court for the Relief of Insolvent Debtors from the debts contained in his schedule filed in that Court.

The following is a copy of so much of the schedule as relates to the present case.

Creditor of the said  
Insolvent.  
  
5. *Samuel Barker, Esq.*  
Great Oldham Street,  
Manchester,  
Lancashire.

£1000. the money borrowed. — As a security for which I gave him my bond for the amount, payable with interest. He likewise holds a policy of insurance on my life in the Norwich Union Insurance Company for the sum of 1000*l.* with the joint security of Mr. *Craig*, for the payment of the premiums on the said insurance. He likewise holds my life-interest in the Queen Anne's Bounty, amounting to about 60*l.* per annum, which sum arises out of certain property at Highmoor in the county of York.

The petition filed by the defendant was in the usual form.

The question for the opinion of the Court was, whether the discharge of the defendant under the order of the Insolvent Court was a bar to the plaintiff's recovering the premiums of the policy with interest, which the plaintiff had paid to the insurance office after such discharge. If it was, then a verdict to be entered for the defendant generally; if not, the present verdict to stand.

*Cowling* for the plaintiff. The question arises upon the covenant in the mortgage deed. If the mortgage were out of the question, the plaintiff then would clearly be entitled to recover; supposing there had been only a covenant to keep the policy on foot, the defendant failing to do so would be liable in an action for the amount of the premiums. A discharge under the Insolvent Act, 7 Geo. 4, c. 57, s. 46, only applies to debts and things in the nature of debts. The other side will contend that this case is within the 51st

1840.  
BENNETT  
v.  
BURTON.



1840.


~  
 BENNETT  
 v.  
 BURTON.

section, which enacts that the Insolvent Court shall set a value upon annuities and other sums of money payable at a future time, and that the discharge shall extend to them, but the sum payable under this covenant does not admit of a fixed value. In *La Coste and others v. Gilham* (a), in which an insolvent pleaded his discharge under the former Insolvent Act (51 Geo. 3, c. 125), to an action of covenant by the assignee of a policy of insurance, for not paying the annual premium, which accrued due after his discharge, the Court decided that this was not such a future sum within the meaning of that act, and that the defendant was not exonerated from payment of it by his discharge; the words in both acts are the same. In *Thompson v. Thompson* (b) the instalments of an annuity, which became due after the bankruptcy, and for which the bankrupt was surety only in case of the default of the grantor, were held not proveable under the fiat, and *Tindal* C. J. said, "Unless they fall within the description of debts or claims or demands which are by the statute made proveable under the commission, the certificate will be no bar within the 6 Geo. 4, c. 16, s. 127;" but in this case the claim cannot be considered as in the nature of an annuity. If this were even the case of an action against the underwriter, yet he would not be discharged, for, although the 53d section of the Bankrupt Act expressly authorises the discharge of an underwriter, yet the Insolvent Act does not contain any similar clause. The defendant by his petition only sought to be discharged from debts and claims for debts set forth in his schedule, but this mortgage is not mentioned in it; the defendant may say that the assignment of the policy was only made by way of collateral security, but the assignment and the covenant, though in the same deed with the mortgage, are independent of it, and therefore though the Insolvent Act takes away the right of action on the covenant to pay the mortgage money, it cannot affect this covenant. If the mortgage debt were satisfied, or dis-

(a) 1 Price, 315.

(b) 2 Bing. N. C. 168.


Charged by the operation of the insolvent's discharge, it could not perhaps be denied that then the covenant to insure would also be destroyed; but by section 46 of the Insolvent Act, a party is only discharged from custody, but not from the debt itself, which still remains in force against him, although it cannot be enforced by action. But, even supposing the debt extinguished by the discharge under the Insolvent Act, if a mortgagee, notwithstanding such discharge, could retain possession of the land, there is no reason why he could not also avail himself of the covenant and assignment of the policy; if the discharge is allowed to have the effect contended for on the other side, it must be extended to the guarantee mentioned in the schedule, which it clearly could not be.

1840.  
  
 BENNETT  
 v.  
 BURTON.

*Hoggins* for the defendant. There is only one question in the case, whether, after the defendant's discharge under the Insolvent Act, damages can be recovered for a breach of covenant to pay money; it is clear from the 46th section that the object of the act was, as far as possible, to discharge the insolvent from all debts and liabilities; the act discharges from all claims mentioned in the schedule; here the debt, for which the mortgage was given is mentioned in the defendant's schedule; but, if the arguments on the other side are correct, the defendant will not be discharged from the debt, but will still continue liable to its payment in a circuitous manner. This is similar to the case of a bankrupt liable to payment of costs, where, as soon as the debt is extinguished, the liability for costs ceases, even where the costs were incurred after the bankruptcy; as where a bankrupt brought error, and was nonprossed; *Scott v. Ambrose* (a). In *La Coste v. Gillman* (b) there was no debt, it was a mere dry covenant. [Coleridge J. Do you carry the argument so far as to say that mortgages are to be reassigned after an insolvent's discharge?] The mortgagee is entitled

(a) 3 Mau. & S. 326.

(b) 1 Price, 315.

1840.  
  
 BENNETT  
 v.  
 BURTON.

to retain the security, and the estate he has under it, but not to proceed personally against the defendant. *Thompson v. Thompson* (a) is not in point; that was merely the case of a surety. [Coleridge J. It would be rather curious if Mr. Craig, who is joint-surety with the defendant for the payment of the premiums, should continue liable when the principal debtor was discharged from his covenant.] Mr. Craig might be sued, because he is not discharged; the question rather is, could he bring his action over against the insolvent who has been discharged?

*Cowling* replied.

LORD DENMAN C. J.—The plaintiff in this case is entitled to recover, unless the debt is absolutely extinguished; but the Insolvent Act only applies to the discharge of the person, and the effect of it is still to keep the debt alive.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Judgment for the plaintiff.

(a) 2 Bing. N. C. 168.

Monday,  
 Nov. 16th.

The QUEEN v. How and others.

Notice to magistrates of an intention to apply for a certiorari to remove an

SIR W. W. FOLLETT had obtained a rule nisi in last Trinity term for a certiorari to remove an order of appointment of overseers for the parish of St. Julian, in Shrews-

order of sessions, pursuant to 13 Geo. 2, c. 18, s. 5, should set forth distinctly who the parties are applying for the writ.

The affidavit of service of the notice ought to shew that the magistrates served were those by whom the order was made, and it is not sufficient that from other affidavits it may be collected that the magistrates who made the order and those served had the same names.

The sufficiency of the notice is still open to objection, although the rule for a certiorari has been enlarged by consent, and the justices have appeared to shew cause.

Order, dated the 7th April, 1840, by the justices of the peace for Shrewsbury and Salop. The rule was subsequently enlarged until this term by consent. The affidavit of service of notice on the justices stated that a notice was served upon *W. Wybergh How* and *Thomas Girdler Gwyn*, and *Henry Diggery Warter*, Esquires, and the Rev. *Charles Leicester*, Clerk; but the affidavit did not state that they were the justices present when the order was made.

1840.  
  
 The QUEEN  
 v.  
 How.

The following is a copy of the notice:

"To *W. W. How*, Esq., Mayor, and *T. G. Gwyn*, Esq., two of her Majesty's justices of the peace for the borough of Shrewsbury, and *H. D. Warter*, Esq. and the Reverend *C. Leicester*, two of her Majesty's justices of the peace for the county of Salop.

"Take notice, that an application will be made to her Majesty's Court of Queen's Bench, at Westminster, on Wednesday, the 27th day of May instant, that a writ of certiorari may issue, to remove into the said Court all and singular orders or warrants of appointment of *S. Probert*, *G. Foreman*, *J. Goodwin*, and *G. Jenks*, being householders in that part of the parish of *Saint Julian*, which is within the said borough, to be overseers of the poor of the said parish of *Saint Julian*. Witness my hand this 7th day of May, 1840.

"*Edward Leake*, Assistant Overseer."

An affidavit was made by *E. Leake*, assistant overseer of the poor, and vestry clerk of the parish of *St. Julian*, which stated that on the 7th of April last, at a meeting of justices then held in the said town of Shrewsbury, an appointment in the words following was signed by *W. W. How*, Esq. and *T. G. Gwyn*, Esq., two of her Majesty's justices of the peace for the borough of Shrewsbury, and by *H. D. Warter*, Esq. and the Rev. *Charles Leicester*, Clerk, two of her Majesty's justices of the peace for the said county.

A copy of the order was then set out, which purported to be made by the said four justices; and the deponent then alleged that the said order was not made at a special sessions duly convened.

*Sir J. Campbell A.G.* and *W. Yardley* now shewed cause. The application is open to this preliminary objection, that the notice of the certiorari does not state the name of

1840.  
  
 The QUEEN  
 v.  
 How.

the person suing out the writ as required by the statute 13 Geo. 2, c. 13, s. 5, which directs that no certiorari shall be issued to remove any order made by justices "unless it be duly proved upon oath that the party or parties suing for the same hath or have given six days notice thereof in writing to the justice or justices, or to two of them, by and before whom such order shall be so had or made, to the end that such justice or justices or the parties therein concerned may shew cause, if he or they shall so think fit, against the issuing or granting of such certiorari." The present case is weaker than either *Rex v. The Justices of Lancashire* (a), in which the notice was signed by the attorney of the party making the application, or *Rex v. The Justices of Cambridgeshire* (b), where the notice was signed by one churchwarden only on behalf of the other parish officers, and in each case the notice was held insufficient: there is nothing to shew that *Leake* has made this application, and it has not been proved that the party who made the application also gave the notice; the notice is defective in another particular, for it does not appear that the notice was served upon those justices by whom the order was made at sessions.

Sir *W. W. Follett* and *Whately*, contra. The notice is sufficient. In *Rex v. The Justices of Lancashire* (a), the notice was only signed by the attornies, and did not state on whose behalf it was given, but here the party signed the notice himself and stated the character in which he did so, namely, as assistant overseer. *Rex v. Cambridgeshire* (b) was decided upon the ground that the notice was signed by only one of the parties who sued out the writ. The objection raised is that it should appear from the notice that the same party who signed it applied also for the certiorari, but the statute does not require that statement. If *Leake* had stated "take notice I intend to apply," that would not be sufficient to meet their objection, for it would not appear that he had applied for the writ; the object of the act, so

(a) 4 B. & Ald. 289.

(b) 3 B. & Ad. 887.

far as it requires service of the notice on the magistrates by whom the order was made at sessions, has been fully attained; the service on magistrates having the same names with those who made the order, and no affidavit is made that they are different persons. If a contrary doctrine were allowed to prevail, its effect would be that it would be impossible to serve notices, unless by persons fully cognizant of all the facts in the case. But the magistrates here admit that they had notice, and have appeared and put in affidavits to obtain an enlargement of the rule, which it is submitted has precluded them from taking any objection to the form or sufficiency of the notice.

1840.  
  
 The QUEEN  
 v.  
 How.

LORD DENMAN C. J.—The act distinctly requires that the party suing out the writ should also in the manner prescribed in sect. 5, give notice to the magistrates of his intention. From the notice in question it does not fully appear that the overseer was the party who intended to apply for the certiorari, nor that the magistrates who made the order at sessions were properly served with the notice. It is no answer to this objection to say that the rule was enlarged, and that the statute was satisfied by the magistrates appearing to shew cause against the rule. It is therefore our opinion that the rule ought to be discharged.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

DOE *d.* ARMSTRONG *v.* WILKINSON.

**EJECTMENT** for a farm at Haslington, in the county of York.

At the trial before *Coltman J.* at the last York assizes, the defendant was proved to be in the occupation of the

which was a distinct parish, but as it did not appear that the defendant was misled by the notice, held that it was sufficient.

In ejectment to recover a farm at H. the notice to quit described the premises to be at D.

1840.

Doe  
 d.  
 ARMSTRONG  
 v.  
 WILKINSON.

farm in question as yearly tenant, and the following notice to quit was put in :

“ I do hereby give you notice to quit and deliver up to me, on the 6th April next, the possession of all that messuage, farm, &c. situated at *Dunnington*, in the county of York, which you now hold under me as tenant from year to year.”

It appeared that *Dunnington* was a distinct parish from *Haslington*, and the learned judge was of opinion that the variance was fatal, but on the counsel for the plaintiff citing the cases of *Doe d. Cox and others*(a) and *Doe v. Archer*(b), his lordship reserved the point, and the verdict passed for the plaintiff.

*E. Perry*, on a former day in this term, moved for a rule nisi to enter a nonsuit. *Doe d. Cox and others* (a), on which the plaintiff relied at the trial, is distinguishable. There the parish was correctly given, but an erroneous name was given to the public house. It was proved also that the tenant was not misled by the notice. Here the plaintiff gave no such proof, and it did not appear that the defendant did not occupy a farm in *Dunnington* as well as in *Haslington*. It was incumbent upon the lessor of the plaintiff to have given such proof, as the difficulty was raised by his own negligence, and as the question was not put to the jury, it is impossible for the Court now to say that the defendant was not misled. Parties should be held strictly to their notices, as it would be most inconvenient to allow a collateral issue to be raised at each time of an ejectment, as to whether the defendant has been misled or not.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered judgment.—It was not suggested in this case that the defendant was misled, but it was contended that it was incumbent upon the lessor of the plaintiff to have shewn the contrary. It was not however put to the learned judge at the trial, that he should

(a) 4 Esp. 185.

(b) 14 East, 245.

leave that fact to the jury, and if it had been so left there can be no doubt that the jury would have found that the defendant was not misled. There must therefore be no rule.

- Rule refused (*a*).

(*a*) See *Cadby v. Martinez*, 3 P. & D. 386.

1840.

DOE  
d.  
ARMSTRONG  
v.  
WILKINSON.

The QUEEN *v.* TRAILL, Esq. and another.

Monday,  
Nov. 23rd.

*PETERSDORFF*, in Trinity term last, had obtained a rule calling upon the defendants to shew cause why a writ of mandamus should not issue, directed to them, commanding them to cause restitution to be made of a certain messuage, situate, &c., pursuant to the order of the judges of assize for the county of Surrey.

It appeared from the affidavits, that on the 18th October, 1839, the defendants, who were justices of the county of Surrey, had given a person of the name of *W. Sewell* possession of the messuage in question under 11 *Geo. 2*, c. 19, s. 16. One *H. Wilson*, who had been tenant of the premises, appealed to the two judges of assize for the county of Surrey, in the spring circuit, 1840, under sect. 17 of that statute, and their lordships, after hearing the appeal, made the following order (after setting out the above proceedings):—

“Now the above named justices of assize having heard the said appeal, and duly considered the same, do, in exercise of the powers conferred upon them by the statute in such case made and provided, order restitution to be made of the said premises to the said *H. Wilson*, the tenant thereof, together with his expenses and costs, amounting to £— &c. to be paid to the said *Wilson* by the said *Sewell*, the said landlord.”

Application was made to the defendants to put this order into effect, but they refused, on the ground of having no jurisdiction so to do.

Where the judges of assize, on an appeal against the decision of justices under 11 *Geo. 2*, c. 19, s. 16, ordering the possession of premises to be given, directed “restitution to be made,” following the words of the act, and the convicting justices who gave possession refused to cause restitution to be made, on the ground of want of jurisdiction, the Court refused to order them so to do by mandamus.

*Quære*, whether the order of the judges of assize is not a sufficient authority for the sheriff to act upon?

*Kelly* (with whom was *Bramwell*) now shewed cause.



1841.  
 The Queen  
 v.  
 Little

A writ only lies to justices where a duty is cast upon them by statute. The order of the judges of assize is not addressed to the defendants. They are therefore not called upon to act. [Lord DENMAN C. J. Is not the order a sufficient authority for the sheriff or any constable to act upon it? Perhaps so; but that does not shew that any duty is cast upon the defendants. [He was then stopped by the Court.]

*Per curiam* contra. Unless this rule is made absolute, grievous injustice will be done. The tenant has been turned out of his possession by the defendants and his landlord; but it is clear that he can bring no action for the eviction: *Astley v. Burne* (a). The 11 Geo. 2, c. 19, directs restitution to be made, but it does not specify by whom it is to be made. It must be implied, however, that it should be made by the justices who dispossessed. If so, it is their duty to give restitution; and the writ lies. [Coleridge J. You must shew that this jurisdiction is given to the justices by the terms of the act; but that is silent on the point.] There is no reason for supposing that the sheriff can be called upon to give restitution.

LORD DENMAN C. J.—It is quite clear that the defendants have no duty imposed upon them under this statute, and therefore we cannot call upon them to act.

LITLEDALE J.—When a judgment in ejectment is reversed in error, I see that the writ of restitution is directed to the sheriff (b), directing him to make restitution of the premises to the tenant.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

(a) 3 B. & Ad. 684.

(b) See Chit. Forms, 125 (5th ed.)

1840.

## The QUEEN v. The Inhabitants of KENSINGTON (a).

ON appeal, by the General Cemetery Company, to the Middlesex Quarter Sessions, against a rate made for the relief of the poor of the parish of Kensington, on the 10th April, 1838, and by which the Company were rated as occupiers of lands and buildings at the sum of 2000*l.* as their rateable value, the sessions reduced the amount to 444*l.* 18*s.*, subject to the opinion of this Court upon the following case:—

The General Cemetery Company are incorporated by stat. 2 & 3 *Will.* 4, c. cx. (local, personal and public), and which forms part of this case, by which they are empowered to purchase and to lay out and inclose a cemetery, and to erect a suitable and convenient chapel for the reception of the dead previous to interment, and for the purpose of performing therein the burial service according to the rites of the established church, and also such and so many covered porches or colonnades, and catacombs and vaults for private and public burials, and such other buildings or building, matters and things, for such purposes, as they might think proper. The capital requisite is directed to be raised by the issue of transferable shares, and the profits, at certain periods, are to be divided among the shareholders.

By the 43rd sect. of the act it is enacted, “that it shall be lawful for the said Company, and they are hereby authorised and empowered from time to time and at all times


(a) Decided at the sittings after this term (Nov. 28th).

walls and fences thereof, in complete repair, and was restrained from selling any land which should have been consecrated and set apart for the burial of the dead. The Company having under these provisions established the cemetery, &c. annually sold in perpetuity the exclusive right of interment in vaults, &c. erected by them. The purchasers had the keys of such vaults delivered to them after closing them up as directed, and the purchasers did all necessary repairs to such vaults, &c., the Company never exercising any act of ownership therein after such sales.

Held, that the Company occupied the lands in which such exclusive right had been sold, and was liable to the poor rate in respect of the purchase money, as a profit of such land.

A Company was empowered by statute to purchase land for the purpose of a cemetery, and to lay out and inclose the same, and to build therein vaults and catacombs, and to sell in perpetuity or for a limited period the exclusive right of interment in them, subject to such regulations and conditions as the Company should think fit. The purchasers of such exclusive right of interment in such vaults, &c. were to close them up with doors. The Company was required to keep the cemetery and the several buildings therein, and the external

1840.

  
The QUEEN  
v.  
Inhabitants of  
KENSINGTON.

from and after the passing of this act, to sell and dispose of to any person or persons who may be willing or desirous to purchase or acquire the same, and at and for such price or prices, or sum or sums of money, and under such regulations and restrictions, and subject to such conditions as the said Company shall think proper to require, the exclusive right of burial or interment, either in perpetuity or for a limited period, as may be agreed upon, in all or every or any of the vaults, catacombs, arches, brick graves, graves, and places of burial which may be from time to time erected, made or built by the said Company within the said cemetery or any part thereof, and also the right and privilege of erecting and making of any family or other vault, catacomb, brick grave, or place of burial within the said cemetery, with the exclusive right of burial or interment therein, either in perpetuity or for a limited period, and also the right and privilege of single interment in any of the vaults, catacombs, brick graves, or other places of burial made or constructed by the said Company, or in the open ground, and also the right and privilege of erecting and placing any monument or cenotaph in the said cemetery, or any monnment, tablet or monumental inscription on or against the walls of the said chapel, or other place appropriated by the said Company for the reception of monuments, tablets or monumental inscriptions, and also the right and privilege of placing any gravestone, or slab of stone or marble or other material, or footstones or headstones, upon or to any grave in the said cemetery."

By the 45th sect. it is enacted, that the conveyance of the exclusive right of burial or interment in all such vaults, catacombs, brick graves and places of burial, and of the right and privilege of erecting and making of any family vaults, catacombs, brick graves, graves or places of burial with exclusive right of burial or interment therein, either in perpetuity or for a limited period, and of the right and privilege of erecting of any monuments or cenotaphs, shall be under the common seal of the said Company.

A form of conveyance is also given by the act, and it is declared that every such conveyance so made shall be good, and have effect both at law and in equity, without words of inheritance, limitation or representation, to vest the exclusive right of burial or interment in the catacomb or vault described therein, or to be erected or made in pursuance thereof, in the person or persons purchasing the same, and his and their personal representatives, legatees and assigns, in perpetuity or for the period agreed upon, without any faculty whatever, subject to the payment of such fees as may be by the rules and regulations of the said Company from time to time payable upon the interment of any corpse in such vault or cemetery, and subject also to such rules, orders and regulations as shall from time to time be made by the said Company for the better regulation of the said cemetery and the vaults and catacombs thereof.

By the 44th sect. the Company is bound to keep the said cemetery and the said chapel, and the several buildings thereon and therein, and the external walls and fences thereof, and all other parts of the same, in thorough and complete repair.

Under the provisions of the act, the Company have purchased the land and have erected the buildings for which they are rated. They have prepared the greater portion of the ground for the purposes of a cemetery, in which interments take place as in common burial grounds. They have also made and built numerous catacombs and vaults, which are wholly unproductive until disposed of under the 43rd section above stated; but many are annually disposed of in perpetuity, according to the form of the conveyance given by the statute, and for the uses therein set forth. Certain portions of the grounds are also annually disposed of according to the provisions of the act, and by the statutable conveyance for family graves, the purchasers of the catacombs and vaults have had the keys of such catacombs delivered to them after closing them up as directed

1840.

The QUEEN  
v.  
Inhabitants of  
KENSINGTON.

1840.

**The QUEEN**  
v.  
**Inhabitants of**  
**KENSINGTON.**

by the 43rd section, and they have done all necessary repairs, the Company never exercising any act of ownership in respect of such family graves, catacombs or vaults, after such sales. But the Company, at each subsequent interment in the family graves, catacombs and vaults, thus sold, charge various fees for the services of the minister, clerk, sexton, &c.

The rate in question was founded upon the principle that the Company are liable to be rated for the produce of the ground sold or disposed of as aforesaid for family graves, and for the catacombs and vaults sold or disposed of as aforesaid during each year for the purpose of burial, under the statute, after deducting therefrom all the expenses of building the catacombs and vaults, and family graves, and all other expenses attendant on preparing them for use, and also upon all the fees paid for the service of the clergyman, clerk, sexton, gravedigger, bellringer, &c. (deducting therefrom the stipends paid by the Company to the clergyman, &c. and all other necessary expenses upon such interments,) and likewise upon all fees due upon common interments where no rights for perpetuity or a term is granted, and upon the herbage growing in the cemetery.

It was contended by the appellants that the Company were not rateable in respect of the produce of the family graves, catacombs and vaults, sold or disposed of as aforesaid during each year, but only upon the fees paid upon all burials therein, and upon common interments (deducting the aforesaid stipends and necessary expenses) in addition to the herbage as before mentioned.

If the Court should be of opinion that the Company are rateable for the sums received by them in respect of the sales for family graves and of the catacombs and vaults, then the rate is to be confirmed. But if the Court should be of opinion that the Company are only liable to be rated in respect of the aforesaid fees and herbage, then the rate is

mended by reducing the amount from 2000*l.* to *s.* (a)

sect. 1, the Company had to purchase and hold to them, their successors, for the use of the taking, &c., and to sell of such of the said as may not have been the purposes of this act in manner by this act di-

enabled the Company, they should be seised of less than might be necessary purposes of the act, to lands.

“ Provided always and ever enacted, that it shall be lawful for the said Company to exercise the authority of the hereinbefore contained, to dispose of any land which shall have been consecrated for the burial of the

enacted “ that in all cases to be made by the Company, under or in pursuance of this act, the word ‘ grant ’ shall be construed as and be construed as if there were express covenants made by the grantees in such conveyances according to the quality of the estate or interest therein, and in such conveyances by the said Company, for themselves and their successors, and the said Company, notwithstanding any act or default of them, were at the time of the execution of such conveyances possessed of the lands, and by granted, for an inde-

feasible interest of inheritance in fee simple, free from all incumbrances done or occasioned by them, or otherwise for such estate or interest as may be thereby granted, free from incumbrances,” and should be construed as covenants for quiet enjoyment and for further assurance.

Sect. 43, after enacting as stated in the special case, enacted “ that every such purchaser and purchasers of the exclusive right of interment or burial, whether in perpetuity or for a limited period, in any such catacomb, vault, or burial place, his or her heirs, executors, administrators or assigns, shall, and he, she, or they is and are hereby required, immediately upon the completion of such purchase, to close the entrance of each such catacomb, vault or place of burial with good and substantial doors, to the satisfaction of the said Company, under the penalty of 10*l.* ”

By sect. 44 it was enacted, “ that the said Company shall, by and out of the monies to be received by virtue of this act, keep the said cemetery and the said chapel, and the several buildings thereon and therein, and the external walls and fences thereof, and all other parts of the same, in thorough and complete repair. ”

By sect. 45, the form of conveyance of the exclusive *right* of burial was given, containing the following terms,—“ do hereby *grant* and convey unto the said — the exclusive right of burial and in-

1840.

The QUEEN

v.  
Inhabitants of  
KENSINGTON.

1840.

The QUEEN  
v.  
Inhabitants of  
KENSINGTON.

Sir *W. W. Follett*, *C. Clark* and *Hodges*, for the appellants. The Company do not deny that they are liable to be rated for those portions of the burial ground, which are used for the purposes of interment in ordinary graves, and produces a profit on each such interment. But the question is, whether they are rateable for other portions of ground, which they have granted away for the purposes of exclusive interment. The Company contend that of these last mentioned portions they are not the occupiers, and consequently that they are not rateable in respect of them. The portions in question are applied to the building of vaults and catacombs, of which the grantees have the exclusive enjoyment and control; the grantees are bound to close the entrance of their vaults with sufficient doors; the grantees keep the keys of their vaults, and have the sole right of entering them, and the grantees repair them. The grantees therefore are the occupiers, and not the Company.

It is clear from the use of the word "grant," in the statutable conveyance prescribed by section 7, and from the interpretation of the word "grant" in section 45, that it is not a mere easement, but an estate in fee in the land itself, that passes to the grantees. "It is difficult to understand how the exclusive use could be demised and the land not," per Lord *Tenterden* C. J. in *Buszard v. Capel* (a); it is still more difficult to understand how the exclusive use of land, in the only way in which the legislature allows the land to be used, can be called a mere easement. The principle of the rate is stated to be, that the Company are liable to be

terment in all [*here describe the vault, catacomb, &c.*] to hold the same to the said — in perpetuity [*or for the period agreed upon*], for the purpose of burial, subject to such rules, orders and regulations as have been or shall from time to time hereafter be made by the said Company for the management and regulation of the said

cemetery, and the catacombs or vaults therein."

By sect. 46, the exclusive right of burial in perpetuity was to be considered as a personal inheritance, and was to be assignable or disposable by will.

(a) 8 B. & C. 141; S. C. 2 B. & B. 197.

rated for the produce of the ground sold for vaults. But that is obviously an erroneous principle; the purchase money received by a vendor on parting with his estate, and in exchange for it, is in no sense a profit of the estate, it is capital. They cited *Rex v. Bell* (b), *Rex v. The Chelsea Waterworks Company* (c).

1840.

The QUEEN  
v.  
Inhabitants of  
KENSINGTON.

*Cresswell* and *Prendergast* contra. The land itself is not sold by the Company, and the act restrains them from selling it. By the 4th section they may, indeed, sell any surplus land that is not required for the purposes of the act; but by the 5th section they are forbidden to sell any land which shall have been consecrated and set apart for the burial of the dead. The 43d section enables the Company to sell nothing but the exclusive right of burial, and such right is, in express terms, all that can pass by the form of conveyance given in the 45th section. All that passes to the grantee of the Company is an easement: *Bryan v. Whistler* (c).

The Company not only retain the ownership of the land in which they have granted the exclusive right of burial, but such a general occupation of it as renders them rateable. The statute gives the Company a general superintendence and control over the cemetery, and obliges them (section 44) to repair it. The grantees are not occupiers, and the duration of their right to use the soil does not affect the question. If a lodger has a room in a house granted to him in perpetuity, with the key of the door, he does not thereby become a rateable occupier. "In order to constitute a rateable occupier, it is necessary not only that the person should have possession, but that he should have such a control and dominion over the subject, as implies freedom from any paramount occupation, or direct interference by a superior with his domestic arrangements and internal management; such as a farmer enjoys over his farm, and the master of a

(a) 7 T. R. 598.

(c) 8 B. &amp; C. 288; S. C. 2 M.

(b) 5 B. & Ad. 156; S. C. 2 N. & R. 318.  
& M. 767.



1840.  
 The QUEEN  
 v.  
 Inhabitants of  
 KESSINGTON.

family over his house." "No lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is, in the eye of the law, the tenant for the whole, and is rated as the occupier;" 1 *Nol.* 175 (a). They cited also *Rex v. Ditchet* (b), and *Rex v. Agar* (c).

If the Company are the occupiers, they are clearly beneficial occupiers so as to be rateable: the profit which makes an occupation beneficial, need not be an annual or renewing profit, as appears from *Rex v. Mirfield* (d), and cases relative to the rateability of mining property.

LORD DENMAN C. J.—The single question is, whether the Company are occupiers. The Company have to give effect to the act, and for that purpose a general power of superintendence and control is devolved on them. The 44th section obliges them to repair. I think they are the occupiers and liable to be rated.

LITTLEDALE J.—The Company may grant certain privileges in perpetuity, but the Company have to keep the cemetery in repair, and the grantees of the privileges cannot enter the cemetery whenever they please. The Company are occupiers, and make a profit by sale of the privileges.

WILLIAMS J.—There is abundant proof of occupation by the Company when *Rex v. Agar* (c), *Rex v. The Mayor of York* (e), and *Rex v. Tewkesbury* (f), are referred to. This is an *à fortiori* case. It is a fallacy to suppose that in this case the Company sell parcels of land. The power to sell is as to surplus land only; as to other land, nothing is sold but the right of sepulture. As soon as it is settled that they are occupiers, it requires no argument to shew that they are beneficial occupiers.

(a) 4th edit.

(b) 9 B. & C. 176; S. C. 4 M. & R. 151.

(c) 14 East, 256.

(d) 10 East, 219.

(e) 6 A. & E. 419; S. C. 1 N. & P. 539.

(f) 13 East, 155.

BRIDGE J.—I am of the same opinion. Whether the annual or not is immaterial to the question of bene-  
 occupation. Some of the facts in this case, if taken  
 without reference to the statute, might lead to the  
 notion that the grantees are occupiers, as they have the  
 and the exclusive use of the sub-soil. But these facts  
 are considered with reference to the act. The Com-  
 mune have only power to sell such land as may not be wanted  
 for purposes of the act. The form of grant, with respect  
 to land, is not of so much land, but of certain rights  
 in land, the Company remaining in possession.

1840.

The QUEEN  
*v.*  
 Inhabitants of  
 KENSINGTON.

Rate affirmed.

The QUEEN *v.* TODD and others (*a*).

Saturday,  
 Nov. 28th.

Appeal against a rate made for the relief of the poor  
 of Middleton, Teasdale, in the county of Durham, the  
 Court confirmed the rate subject to the opinion of this  
 Court upon the following case:—

Appellants, who were rated inhabitants of the town-  
 of Middleton in Teasdale, in the county of Durham,  
 appealed against the rate on the ground that the overseers  
 permitted to rate the Duke of *Cleveland* as occupier of  
 lands and tenements, *i. e.* of certain lead ore and  
 land within the township. The Duke of *Cleveland* is  
 an inhabitant of the township of Middleton, in Teesdale,  
 who has been seised of the waste therein and of the mines and  
 lands within and under the same as tenant for life,  
 and has power to lease for twenty-one years. By indenture  
 bearing date the 21st of June, 1836, between his  
 Majesty of the one part, and the Corporation of the Go-

The owner of  
 wastes and of  
 the mines and  
 minerals under  
 them demised  
 certain lead  
 mines for  
 twenty-one  
 years, the les-  
 sees to yield  
 one-fifth share  
 of the ore  
 raised by them,  
 well cleansed,  
 and made mer-  
 chantable and  
 fit for the  
 smelting mill.  
 The ore before  
 delivery to the  
 lessor had to  
 undergo a very  
 laborious and  
 expensive pro-  
 cess in being  
 bruised, dress-  
 ed and made  
 merchantable

(*a*) Decided at the sittings after the term.

for smelting, by which all foreign substances were separated from the ore, but  
 the character of the ore was not otherwise altered:—Held, that the lessor was liable to  
 the rate in respect of his fifth, as an occupier of land.

1840.

  
The QUEEN  
v.  
TODD.

vernor and Company for smelting down Lead with Pit Coal and Sea Coal of the other part, he demised, leased, set, and to farm let, unto the said Governor and Company (among other things) all the lead, mines, or groves, veins, rakes, strings, and flats of lead and other ore, opened or to be opened, situate, lying, and being within or under certain specified districts within the said township, together with all houses, shops and buildings thereto belonging, or otherwise occupied or enjoyed, together with full power for the said Governor and Company, with miners and other workmen, to enter into and upon the land and ground within the limits and bounds thereinbefore respectively described, and there to search for, dig, work, sink, drive, and make groves, shafts, lumps, drifts, way-gates and levels, and to alter, erect and build any engine or engines, and other works, and to use all other ways and means from time to time during the continuance of the demise, for the finding, discovering, winning and working the said mines and premises, and also sufficient ground room and heap room for the laying of earth, rubbish, stones, lead, or other ore, raised, and full right of way over the wastes and inclosed lands in the said township adjoining the demised premises, houses, cottages, ringsteads, smiths' forges, storehouses, hovels and other buildings for the use of the workmen, and for cleansing, washing and dressing the ore found and raised; saving and reserving to the said duke, his heirs and assigns, full liberty, power and authority to enter into and upon the mines and premises thereby demised, by the ways after mentioned, to view the same; to have and to hold, receive, take and enjoy the said mines and veins of lead and other ore, and all other the said liberties, privileges and premises thereby demised unto the said Governor and Company, their successors and assigns, for and during the term of twenty-one years, yielding and paying, during the continuance of the demise, unto the said Duke of *Cleveland*, his heirs and assigns, one full fifth part, share and proportion of all the lead or other ore which should from time ~~to~~


time and all times thereafter, during the continuance of the demise, be won, wrought, raised or gotten out of and from the said demised premises, or any part thereof, well and sufficiently cleansed, dressed, washed and made merchantable and fit for the smelting mill, at the costs and charges of the said Governor and Company, their successors and assigns, and then to be delivered at the ringsteads upon the premises when the same should be dressed and washed as aforesaid, clear of all deductions or abatements on any account.

Covenants for weighing the lead, for quiet enjoyment, and for a render of a one-fifth part, &c.

During the period for which the rate was made, the Duke of *Cleveland* received in the township from the Governor and Company, and disposed of to his own profit, one-fifth part of all the ore raised by the said Governor and Company from the mines in the township demised to them. The ore, previously to being delivered to the Duke of *Cleveland* under the lease, had to undergo a very laborious and expensive process in being bruised, dressed and made merchantable and fit for smelting, by which all foreign substances were separated from the ore, but the character of the ore was not otherwise altered. Upon these facts the appellants contended that the Duke of *Cleveland* was rateable as occupier of land within the township. The sessions held that he was not rateable.

If this Court should be of opinion that he was so rateable, the order of the Court of Quarter Sessions was to be quashed, and the rate to be amended by inserting therein an assessment on the Duke of *Cleveland*, as an occupier of land in the said township, on the sum of 2000*l.* per annum, which was agreed to be the rateable value of the ore received by him under the lease; but, if this Court should be of opinion that the duke was not, the order of the Court of Quarter Sessions was to be confirmed.

Sir *W. W. Follett*, *Starkie* and *Granger*, in support of the order of sessions. The Duke of *Cleveland* has demised

1840.  
  
 The QUEEN  
 v.  
 TODD.

1840.

The QUEEN  
v.  
TODD.

the mine; he, therefore, is not the occupier, and cannot be rated for it. "The rateability seems to depend upon the subject assessed being actually occupied by the person rated. Where a portion of the native mineral is reserved to the owner of the mine, he is rateable for it as the occupier of so much land, receiving the profits without risk, and freed from the hazard of working; they are assessable as the profits of so much land, and his lessee of the share would be equally rateable. But, if the owner puts himself out of possession of the mine altogether, standing towards the workers of the mine in the relation of landlord to a tenant, whether he reserves to himself a monied rent, or a portion of the mineral in its manufactured state, as, for instance, so much smelted lead, neither the owner nor his lessee are held rateable(a)." The present case is to be governed by *Rex v. Bishop of Rochester*(b) and *Rex v. The Earl of Pomfret*(c). In *Rex v. St. Austell*(d), where the mine owner was held rateable, he had not demised the mine itself, but had merely granted a liberty to dig. Here the lessor has demised all, and he could not except part of what he had demised: *Co. Litt.* 47 a. Indeed the thing to be delivered to the lessor wants the essential qualities of an exception: it is not ore in its primitive state, but ore that has passed through a laborious and expensive process; it is therefore to be considered rent as in *Rex v. Tremayne*(e). The only difference between this case and *Rex v. The Earl of Pomfret*(c), is that in the latter case the lead received by the lessor was to be previously smelted; here it is not smelted, certainly, but it is subjected to certain operations, which amount to the same thing, as regards the present question.

*Cresswell*, contra. The lessor does not receive the ore

(a) 1 Nol. P. L. 148, 4th ed.

D. & R. 351.

(b) 12 East, 353.

(c) 4 B. & Ad. 162; S. C. 1 N.

(c) 5 Mau. & S. 139.

& M. 194.

(d) 5 B. & Ald. 693; S. C. 1

r in his character of landlord: it may perhaps be  
y him under a sort of grant. But, however this  
is a portion which he occupies of the earth itself,  
hich he is rateable. In *Rex v. The Bishop of*  
no ore had been, in fact, raised at all; but Lord  
ugh C. J. expressly lays down that if the tenants  
and part of it be received by lessors, that the case  
varied. The present case is clearly within *Rex*  
*ptist Mill Company (a)*, and the other cases lately  
l in *Reg. v. Crease (b)*. In *Rex v. The Earl of*  
the smeling of the ore was considered to have  
character.

1840.  
The QUEEN  
v.  
TODD.

ham, who was to have argued on the same side,  
illed upon.

ENMAN C. J.—We think the Duke of *Cleveland*  
pier of a portion of the soil.

BDALÉ, WILLIAMS, and COLERIDGE Js. con-

### Order of Sessions quashed.

(a) 1 Mau. & S. 619.

(b) 3 P. & D. 434.

### KITCHING v. CROFT and another.

ASS quare clausum fregit, with a second count  
ault. Plea (amongst others), a justification under

Tuesday,  
November 3d.

An insolvent,  
having been  
committed to  
prison on the  
15th July,

debt under 20*l.*, was discharged from custody by the Court on the 2d  
he first day of Michaelmasterm). On the 1st October, 1838, the Imprisonment  
t (1 & 2 Vict. c. 110) had come into operation, and on the 23d October a  
itioned the Insolvent Court for a vesting order under the provisions of that  
26th that Court made an order, vesting the insolvent's estate in a pro-  
gnee; and on the 24th November (after the insolvent's discharge) a second  
ade vesting the estate in the petitioning creditor:—Held, that notwithstand-  
arge of the insolvent, his estate had become vested in his assignee.

1840.  
  
 KITCHING  
 v.  
 CROFT.

At the trial at the last Lincolnshire assizes, before Lord *Denman* C. J., the question was as to the title of *Acton* to the close mentioned in the declaration. The close had originally belonged to the plaintiff, who, on the 15th July, 1837, was committed to prison in execution for a debt under 20/. On the 1st October, 1838, and whilst the plaintiff was still in prison, the Imprisonment for Debt Act, 1 & 2 *Vict.* c. 110, came into operation, and on the 23d October following, *Acton*, who was one of his creditors, petitioned the Insolvent Debtors' Court for a vesting order, under section 36 of that act. On the 26th October the Court made an order, under section 37, vesting the estate and effects of the plaintiff in a provisional assignee, and on the 24th November the estate was vested in *Acton*, as assignee. The plaintiff had been discharged out of custody by the Court of Queen's Bench, under the 48 *Geo.* 3, c. 123, on the 2d November previous, and it was contended at the trial that as the plaintiff was entitled to be discharged out of custody under the 48 *Geo.* 3, c. 123, at the time the petition had been presented, having been then in custody for more than a year, the Insolvent Debtors' Court possessed no jurisdiction to make a vesting order under the 1 & 2 *Vict.* c. 110, the object of that statute (section 36) being to make the estate and effects of prisoners available for their creditors, whereas in the present case the debt of the plaintiff was wholly discharged when he had undergone a year's imprisonment. Lord *Denman* C. J. reserved the point, and the verdict passed for the defendants.

*Humfrey* now moved for a rule nisi to enter the verdict for the plaintiff. At the time the Insolvent Court made the order, vesting the plaintiff's estate in the provisional assignee, the plaintiff was entitled to his discharge; and he had been in fact discharged before the order of the Insolvent Court vesting the property in *Acton*. He was entitled to his discharge even before the 1 & 2 *Vict.* c. 110, came into operation, and had made satisfaction to his debtor by

going the year's imprisonment. [*Littledale J.* The 48 Geo. 3 gives the superior Courts power to discharge a prisoner, but does it make it compulsory on them to do so? It is only a rule to shew cause, and it is a matter which the Court are to exercise a discretion.] It is very al to refuse such an application. If the vesting order been made within the year of the plaintiff's imprisonment it might have been good; though perhaps it would have been so even then: but the jurisdiction of the Court had expired when the vesting order was

[*Littledale J.* The Insolvent Court clearly had jurisdiction on the 26th October, when the first vesting order was made; then when the plaintiff got his discharge on the 27th November, ought he not to have applied to the Insolvent Court to rescind their former order, on the ground that he was no longer in custody?] There is no provision in the Act under which he could apply. As soon as he was discharged he was out of the jurisdiction of the Court. [*Bridge J.* The estate is vested in the provisional assignee at the discharge. Suppose an ordinary case, and that a vesting order had been made, and the estate had been sold and there was a surplus; would there be no power to have the surplus?] In such a case a prisoner does not get out of the jurisdiction of the Insolvent Court; if he has any other property, his creditors may again bring him before the Court.

MR DENMAN C. J.—The argument proceeds on the ground that the order was a nullity. It seems clear that the Court had jurisdiction to make it.

MR LITTLEDALE J.—On the 23d October *Acton* petitions the Insolvent Court, on the 26th the insolvent's estate and effects are vested in the provisional assignee by an order of the Court; and on the 24th November, by another order, they are vested in *Acton*. If we now say that this latter vesting order is a mere nullity, the effect would be, that all

1840.

KITCHING  
v.  
CROFT.



1840.

KITCHING  
v.  
CROFT.

previous proceedings of the Insolvent Court would be rendered null. If that Court had done wrong in making the latter order, this is not the mode of setting them right.

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

Saturday,  
Nov. 14th.

The QUEEN v. The Inhabitants of EAST WINCH.

A yearly servant left his master's house from illness before the end of the year, and went and resided at his father's house in a different parish, where he remained to the end of the year, his master supplied him with food and medical attendance for the entire period he was absent, and paid him wages for the whole year:—  
Held, that the pauper gained a settlement by hiring and service in the parish where he resided during his illness.

ON appeal to the Quarter Sessions for the county of Norfolk against an order of removal of a pauper to the parish of East Winch, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper *Robert Griggs* was living in East Winch, the place of his father's settlement. He was let by his father before Old Michaelmas Day, 1791, to one *William Knights* of the parish of Leziate from such Old Michaelmas Day till the following Old Michaelmas Day, at the wages of two guineas and his board and lodging. He entered such service and continued therein, sleeping at his master's house in Leziate until about a week after the next Midsummer, when he was taken ill, and being unable to work was sent by his master to remain at his father's house at East Winch till well enough to return to his work, and during such time he received victuals from his master, and was attended by a medical man at his master's expense. Having continued unable to work during the remainder of the year, he did not return again to sleep at his master's, and after the expiration of his year he received his wages for the whole year. If the Court should be of opinion that the pauper did not obtain a settlement in the parish of Leziate then the order of sessions was to be confirmed.

*B. Andrews* and *Palmer*, in support of the order of sessions, were not called upon.

*Gurdon* and *O'Malley* contra. This case is governed by *Rex v. Sutton* (a), where a yearly servant, before the end of the year being deprived of his reason, was taken home by his father, who lived in a different parish, and who received the wages for the whole year, and it was held that the servant acquired a settlement in his master's parish, though the remainder of the year he continued with his father. This case was cited in *Rex v. Dremerchion* (b), which, though apparently at variance with *Rex v. Sutton* (a), does expressly overrule it. The cases of *Rex v. St. James*, in *St. Edmund's* (c) and *Rex v. St. Lawrence Ludlow* (d) are cases of accidents, and it was held that the paupers were not removable under the 13 & 14 Car. 2, c. 12, as they did not come to the parish to settle or inhabit.

1840.

The QUEEN  
v.  
Inhabitants of  
EAST WINCH.

LORD DENMAN C. J.—If I had any reason to suppose that our decision in this case would have the effect of raising doubts as to the law of settlement, I would hesitate before we decided that the pauper had not acquired a right of settlement in his master's parish; but, so far from holding that position, I think we should appear rather to create doubts by introducing this exception to the general rule, in the present case. While the pauper resided in the father's parish, the contract of service was in force, and the pauper acquired a settlement in his father's parish by residing there. The opinion expressed on the present question in *Rex v. Sutton* (a) was extrajudicial.

LITLEDALE, WILLIAMS, and COLERIDGE Js. concurred.

Order of Sessions confirmed.

(a) 5 T. R. 657.

(b) 3 B. &amp; Adol. 420.

(c) 10 East, 25.

(d) 4 B. &amp; Ald. 660.



1840.

*Saturday,  
November 7th.*

Where chattels are deposited with a party who claims a lien on them, after notice from the bailor of the sale of the chattels to a third party, the bailee cannot as against the vendee claim a further lien in respect of a debt incurred to him by the bailor after such notice, though the chattels remain in his books in the name of the bailor.

## BARRY v. LONGMORE.

**TROVER.** The cause was tried at Guildhall before Lord *Denman* C. J. when it appeared that a quantity of paper had been delivered by one *Hunt* to the defendant, a wharfinger, in July, 1839, to be retained in defendant's custody, and that about the same period *Hunt* was indebted to the defendant. Shortly afterwards the plaintiff purchased the paper from *Hunt*, but without obtaining any delivery order from him on the defendant. *Hunt*, however, called on the defendant and informed him of the sale, but the paper still remained in *Hunt's* name on the defendant's books. In October a meeting of *Hunt's* creditors was convened, when the plaintiff claimed the paper and made a tender of the amount of *Hunt's* debt to the defendant up to the time when *Hunt* had given the defendant notice of the sale; the latter claimed a lien on the paper in respect of a debt contracted by *Hunt* after notice of the sale, and refused to deliver the paper, except upon payment of the whole debt, upon which the plaintiff brought the present action. The plaintiff recovered a verdict, leave being reserved to the defendant to move to enter a nonsuit.

*Platt* now moved accordingly, and contended that the defendant was entitled to a lien on the paper so long as it remained in the name of the bailor. The usage is, when a party sends goods to a wharf, which are afterwards sold by sample, that a delivery order is given by the vendor to the vendee, which is presented to and lodged with the wharfinger, and thereby the wharfinger is protected from any claim on the part of the vendor, and the goods are then entered in the books of the wharfinger in the name of the vendee. Here no step of this description was taken by the plaintiff, no entry was made in his name, but, when the defendant was in difficulties, the plaintiff then claims the property. The property in the paper did not pass by the statement of *Hunt* to the wharfinger.

**LITLEDALE J.**—The question here is whether the defendant can claim a lien on the paper for a debt contracted by *Hunt* after the defendant had notice of the sale to the plaintiff—it seems to me he cannot; it is true there was no order for delivery, but inasmuch as the sale was notified to the defendant such order was unnecessary; the notice comes to the same thing.

1840.

~~~~~  
BARRY  
v.  
LONGMORE.

**WILLIAMS and COLERIDGE Js. and Lord DENMAN C.J.**  
occurred.

Rule refused.

PIGEON and another v. OSBORN.

Monday,  
Nov. 16th.

**CHARNOCK** moved for a rule, calling upon the defendant to shew cause why the order of a learned judge, bearing date the 23d June last, should not be rescinded, and the demurrer thereby set aside restored.

The declaration was in assumpsit for goods sold and delivered. Plea: that the goods in the third count mentioned were with the knowledge, privity and consent of the plaintiffs, sold and delivered to the defendant by one *W. Hood*, being then the agent and factor of and for the plaintiffs, in his the said *Hood's* own name, as the true and sole owner thereof, and as and for his the said *Hood's* own goods, and that the plaintiffs did not appear, nor were they known by the defendant at or before the time of the said sale or delivery of the said goods to the defendant, as the proprietors of the same, or that they the plaintiffs were in anywise interested therein. And the defendant says that he then bought and accepted the goods of and from *Hood* as the proper goods of *Hood*, and that credit for the goods was then given by *Hood*. Averment: that *Hood*, at the time of sale, was indebted to defendant in a large sum for goods sold, out of which the defendant offered to set off, &c. Verification.

To a declaration for goods sold, the defendant pleaded that the goods were sold with the plaintiffs' privity by one *H.* as the owner thereof; that defendant had no knowledge that the goods belonged to the plaintiffs, and that the defendant had a set-off against *H.* Replication, that the goods were not sold with the plaintiffs' privity by *H.* as the owner thereof. The Court set aside a demurrer to the replication, as frivolous.

Replication: that the goods in the above plea mentioned

1840.

~~~~~  
 PIGEON  
 v.  
 OSBORN.

were not with the knowledge, privity or consent of the plaintiffs sold and delivered to the defendant by the said *Hood* in his *Hood's* name, as the true and sole owner thereof, and as and for his the said *Hood's* own goods, modo et formâ.

Special demurrer, on the ground that the replication contained a negative pregnant.

On a summons before *Coleridge J.*, the learned judge ordered the demurrer to be set aside as frivolous.

*Charnock* contended that the replication contained a negative pregnant, as it admitted that the goods were sold by *Hood* as his own goods, and therefore was like the case where in trespass for entering the plaintiff's house the defendant pleaded that he entered by the leave of the plaintiff's daughter, and the replication alleged that he did not enter *per licentiam suam: Myn v. Cole(a)*. So where defendant pleads that the cattle died in a pound overt, by the default of the plaintiff, and the plaintiff replied that the cattle did not die in a pound overt, this is bad as a negative pregnant: *Bac. Abr. Pleas and Pleading, Negative Pregnant, (I 6)*.

**LORD DENMAN C. J.**—It seems clear that this is a frivolous demurrer.

**LITLEDALE J.**—The replication is quite correct. The plea consists of two parts; it alleges, first, that the goods were sold by *Hood* as his own, with the privity of the plaintiffs; and secondly, that *Hood*, at the time of the sale, was indebted to the defendant. The plaintiffs, by their replication, wish to deny the first of these allegations; and in what other way are they to do so than in that which they have adopted? If they had replied the sale by themselves as owners, absque hôc that *Hood* sold with the plaintiffs' privity, there could have been no objection to that; and the replication as it stands amounts to the same thing.

**WILLIAMS J.** concurred.

(a) *Cro. Jac.* 87; 2 *Wms. Saund.* 319, note (6).

COLERIDGE J.—It appears to me that the allegation in the replication is equivalent to the plaintiffs saying, “we say that the sale by *Hood* took place with our privity.”

1840.

PIGEON  
v.  
OSBORN.

Rule refused.

FISHER v. FORD.

Tuesday,  
Nov. 10th.

COVENANT. The declaration (dated the 7th May) contained the following excuse for proferat, “which said indenture, sealed &c., being in the possession of the defendant, the plaintiff cannot produce the same to the Court.”

Plea (dated the 21st June): that the said indenture is *not* in the possession of the defendant *modo et formâ*.

Special demurrer and joinder.

*Butt* in support of the demurrer. The statement in the plea is not an answer to the declaration; it does not aver that the defendant had not the deed in his possession at the time of the declaration. In *Evans v. Prosser* (a) the defendant pleaded a plea of set-off, stating the set-off as if it only existed at the time of the plea, and it was decided that the plea was not sufficient, inasmuch as it should have alleged that, at the period of the commencement of the action, the plaintiff was indebted. That decision is analogous; the plea applies to the 21st of June, the date of the plea, whereas it ought to apply to the time of the declaration, viz. the 7th May. No certain issue could be raised upon the plea, the statements in it being quite consistent with the fact, that the defendant had the deed at the commencement of the action, but got rid of it before the date of the plea. [Lord Denman C. J. Your argument is simply that the allegation in the plea does not apply to the time mentioned in the declaration, and so is no excuse.]

The plaintiff in covenant alleged as excuse for proferat that the deed, “being in the possession of the defendant,” the plaintiff was unable to produce it:—  
Held, that a plea which stated only that the deed “is not in the possession of the defendant modo et formâ” was bad.

(a) 3 T. R. 186.

1840.

  
 FISHER  
 v.  
 FORD.

*Warren* contra. The plaintiff in his declaration takes upon himself to aver that he is unable to make profert, and it lies upon him to shew a proper *excuse for not doing so*. According to the rule given in 1 *Chit. Plead.* 522(a), "where the time is not material, the plea should follow the day mentioned in the declaration;" in the plea the defendant says he has not the deed "in manner and form," which can only be taken to mean the manner and form in which it was alleged in the declaration, "the excuse for the omission of profert must be stated according to the fact," 1 *Chit. Plead.* 365(b); the plaintiff therefore need not have proved more than that the deed was in the possession of the defendant at the time of the declaration. In *Basan v. Arnold*(c), the defendant, in an action upon a bill of exchange, pleaded that the plaintiff had indorsed the bill to another party, and that the defendant was and still is liable to pay the amount to such other party; the replication stated that at the commencement of the suit the plaintiff was and still is the holder of the bill. On special demurrer to this replication, on the ground that it sought to raise an issue whether any other party was such holder at the date of the replication, and that, if the replication put in issue the fact whether any other than the plaintiff were such holder at the time of such plea being pleaded, the issue raised was immaterial, the Court decided it was no answer to the plea, and that it raised an immaterial issue.

Per CURIAM(d)—

Judgment for the plaintiff.

(a) 6th ed.

(b) 6th ed.

(c) 8 D. P. C. 356.

(d) Lord Denman C. J., *Little-  
dale, Williams and Coleridge Js.*



1840.

THE QUEEN v. STEWART and another.

In Hilary term last (January 24) obtained a rule on the defendants, who were overseers of the parish of St. George, Hanover Square, Middlesex, to shew cause why a mandamus should not issue, compelling them to remove from St. George's Hospital the body of *Kershaw*, deceased. It was part of the rule that the body should be at once interred at the expense of the overseers of St. George's Hospital, the overseers of the parish undertaking not to take any advantage of the body when so interred, and to reimburse the hospital if the overseers should be of opinion that the overseers were to remove and inter the body.

The rule was obtained on affidavits made the 21st of August, by *George Kershaw*, the husband of the deceased of *Mr. Locke*, clerk to St. George's Hospital. The first deponent stated, that he and the deceased, in August last July, resided in the parish of St. George; that the same month the deceased was received as an inmate in St. George's Hospital; that she remained there until her death, which took place on the 17th January last, and that her body remained there unburied in consequence of the deponent being unable from poverty to take and bury the same; that deponent still resided in the parish of St. George, and had been relieved by that parish for many years preceding, and believed himself to be set-

*Locke* in his affidavit stated, that the president, treasurer, and governors of St. George's Hospital were incorporated by an act of 4 Will. 4, intituled "An Act to incorporate the Subscribers to Saint George's Hospital at Hyde Park Corner, and for better enabling them to carry on their charitable designs." That the de-

Monday,  
November 9th.

Overseers are not bound, either by common law or the 43 *Elix.* c. 2, to bury a pauper settled in their parish, who dies in the parish, but not in any parish house.



1840.

The QUEEN  
v.  
STEWART.

ceased at the time of her death was possessed of no property whatever.

In opposition to the rule *Mr. Chappell*, vestry clerk of the parish of St. George,

Deposed, that in the year 1838 several applications were made to the vestry of the said parish by the governors of St. George's Hospital respecting the burial of poor persons who had died in the said hospital, in consequence of which the subject was taken into consideration by the vestry and an investigation made, by which it was ascertained, that in the original terms offered to the public in 1733, when subscriptions were solicited to establish St. George's Hospital, the promoters expressly undertook to bury all those dying therein whose friends were not able to bury them, as appears by one of the original laws of the said hospital; that the patients who died in the said hospital from the period of its institution were buried in the parish burial ground at the expense of the funds of the said hospital, until the year 1746, when the number of patients having greatly increased, that mode of burial was found to be attended by so much inconvenience, that the governors of the hospital, at the instance of the officers of the parish, provided, at the cost of the hospital, a piece of ground for a burial place in the parish of Kensington, which continued to be used as the burial place of the hospital until the year 1825, when the governors of the hospital disposed of the same for the sum of 3000*l.*, and that the governors of the hospital had not provided any other burial place in the stead thereof, but had since endeavoured to depart from their previous rules and resolutions, and to throw the expense of the said burials upon the rate-payers of the parish.

That the governors and directors of the poor of the parish had provided two infirmaries in the workhouse of the parish, and had also appointed five medical practitioners to attend to the sick poor in the parish, whether belonging to the parish or not.

That by the accounts of the district registrars of the parish it appeared, that the number of deaths there since the Registration Act came into operation in July, 1837, up to the 31st December, 1839, were 3727; of which number above 709 are registered as deaths in St. George's Hospital.

1840.  
  
 The QUEEN  
 v.  
 STEWART.

Mr. *Dyson*, clerk to the parish solicitors, deposed, that he had referred to the original reports of the governors of St. George's Hospital, and had found that the said hospital was founded on the 19th of October, 1733, and one of the original laws of the institution, as stated in the report of the promoters of the hospital in 1734 was as follows:—  
 “That no security be required for the charge of burial in case of death, and that all such as shall die in this house whose friends are not able to bury them, shall be buried at the expense of the house.”

That the same law was continued by the governors in their subsequent reports, and the expense of such burials included in the expenditure of the hospital in their reports in 1735 and 1736; and that in their report for 1737 it is stated, that no security for burial or removal of patients of the said hospital was desired, nor any money, gift or reward taken of them or their friends on any account whatsoever; that those who died in the hospital, if their friends were unable, were buried at the charge of the hospital, and that money was collected as a separate fund for clothing such patients on their discharge as they stood in need of it, and furnishing those with some little sum of money whose distance from their habitations or other particular necessities required it. That a similar statement is contained in subsequent reports of the said hospital down to the year 1747.

That the more modern reports of the governors of the hospital contain similar statements as to the burials; that in the report published in the year 1827 it is stated, “no security for the burial of patients is required, nor any money, gift or reward taken from them or their friends on any account whatsoever. Those who die, if their friends

1840.

  
The QUEEN  
v.  
STEWART.

are unable, are buried at the charge of the society." And that he also found the following in the report of the governors of the hospital published in 1830:—"Those who die, if their friends are unable, are buried at the charge of the society." And that he also found the following in their report published in the year 1831:—"Those who die are buried at the charge of the society, when it is found that their friends are unable to incur the expense."

That he had carefully examined the reports of the other metropolitan hospitals, particularly those of the London Hospital, the Westminster Hospital, the Middlesex Hospital and the Dreadnought Hospital for seamen, and in no instance had been able to discover that the expense of the burial of the patients of the hospital is thrown upon the parishes in which the said hospitals are situated; but that such burials are paid for out of the funds of the hospitals, or security taken for the expense of such burials from the friends of the patients.

That by personal application at the hospitals of St. Bartholomew, St. Thomas and Guy's, he had also ascertained the same practice to prevail at each of those hospitals.

That commendatory letters for patients, printed and issued from St. George's Hospital, and now in daily use, contain the following words:—"No security is required should a patient die in the hospital."

*Bodkin* and *Doane* now shewed cause (*a*), and referred to *Rex v. Coleridge* (*b*) to shew that the subject was one of ecclesiastical jurisdiction, and to *Anonymous* (*c*) to shew that parish officers had no such general duties cast upon them as the application appeared to assume.

Sir *J. Campbell*, A. G. and *Platt*, contra, relied on the 43 Eliz. c. 2, and on the common law right of burial, citing *Com. Dig. Cemetery* (B), and on 48 Geo. 3, c. 75, reciting,

(*a*) Before Lord *Denman*, C. J.,  
*Littledale, Williams and Coleridge*,  
Js.

(*b*) 2 B. & Ald. 806.

(*c*) 3 A. & E. 552.

provision hath yet been made by the laws now in providing suitable interment in churchyards or burial grounds for such dead human bodies as may be cast on shore from the sea by wreck or otherwise."

1840.  
  
 The QUEEN  
 v.  
 STEWART.

*Cur. adv. vult.*

DENMAN, C.J. on a subsequent day in this term (per 24) delivered the judgment of the Court.

There was an application for a mandamus to the overseers of the parish to remove the dead body of a pauper settled in the parish, who had died in St. George's Hospital, from the hospital, and to cause it to be buried. The application was made on behalf of the hospital, and, although upon argument we felt extreme difficulty in placing on any foundation either the right of the hospital to the writ, or the obligation on the parish to do the act required, we were unwilling at once to discharge the rule, considering how long the practice had prevailed and been followed of burying such persons at the expense of the parish, and the general consequences of holding that such was no warrant in law.

In the argument for the rule, the necessity of the case, the true construction of the words of the statute of the 48 Geo. 3. c. 75, and an inference from the 48 Geo. 3. c. 75, for the burial of shipwrecked bodies cast on the shore, were alone urged. These all appear to us insufficient. In the last statute there are undoubtedly words from which it may be inferred that the framers of it recognized burials at the expense of the parish; and in a doubtful case such reasoning might weigh something in affirmance of the legal obligation on the parish to provide such burials. But in the present case we are thrown necessarily on the statute of 1801. The overseer is a statutable officer dealing with a statutable fund, and accountable for its application to statutable purposes. The language of that statute is plain and without doubt; the relief and the employment of the

1840.

~  
The QUEEN  
v.  
STEWART.

chargeable poor are its objects, the fund is created for them and cannot be diverted from them unless to objects specifically engrafted on them by subsequent statutes, of which this is not one. No usage, however proper in itself, or however uninterrupted, can prevail against that which the plain construction of a statute forbids; and we cannot accede to the argument that the burial of a pauper receiving relief, *but not dying in any parish house*, can be brought within the objects of the statute expressed or implied.

We limit the rule thus purposely; for in passing on to the ground of necessity, we wish to be understood as distinctly recognizing its existence, while we deny its application in the way now contended for. Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial, and that implies the right to be carried from the place where the body lies to the parish cemetery. Further, to use the words of Lord *Stowell* in *Gilbert v. Burzard*(a), "that bodies should be carried in a state of naked exposure to the grave would be a real offence to the living as well as an apparent indignity to the dead." We have no doubt therefore that the common law casts on some one the duty of carrying to the grave decently covered the dead body of any person dying in such a state of indigence as to leave no funds for the purpose. The feelings and the interests of the living require this, and create the duty, but the question is on whom it falls. It is enough for the discharge of this rule to say that it is not cast upon the overseers, where the death does not take place under the roof of any parish house.

But the principles above laid down seem to point to an important distinction, and we think it right in the present case, with a view to the extensive consequences of our decision, to state it. It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial. He cannot

(a) 2 Hagg Cons. Rep. 344.

keep the body unburied, nor do any thing which prevents Christian burial; and he cannot therefore cast it out so as to expose it to violation, or to offend the feelings of the living, and for the same reason he cannot carry it uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish house, poor house or union house, that circumstance casts on the parish or union, as the case may be, the duty of burying the body, not by virtue of the statute of *Elizabeth*, but on the principles of the common law.

In the present case, however, the same principles would rather cast the burden on the hospital than the parish, and form an additional, though not a necessary reason, for refusing the writ.

Rule discharged.

BROWNE v. DAWSON and others.

**TRESPASS** quare clausum fregit. Second plea, that the premises were not the premises of the plaintiff, and issue thereon.

The case was tried before Lord *Denman*, C. J. at the Merionethshire summer assizes, 1840, when a verdict, under the direction of his Lordship, was found for the defendants.

*Jervis* in the Michaelmas term following (a) moved for

(a) November 4th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge*, Js.

case of misconduct. In pursuance of this rule the trustees on the 28th June dismissed the plaintiff, who acquiesced in the dismissal, and the school was then peaceably taken possession of by the trustees, and locked up. On the following day the plaintiff re-entered by force. On the 11th July he was ejected by the trustees. To trespass against them for such eviction, the trustees pleaded that the plaintiff was not possessed.

*Held*, 1. That the plaintiff having re-entered by trespass, had not by the very act of the trespass acquired possession, within the meaning of the plea, against the trustees, who had never acquiesced in his re-entry.

2. That the written rules for the regulation of the school were not an agreement within the Stamp Act.

1840.

The QUEEN  
v.  
STEWART.

*Tuesday,*  
*Nov. 17th.*  
The plaintiff was master of a school, which was under the control of trustees, and, as such, was allowed to occupy a school house. The trustees had drawn up certain rules, one of which provided for the master's dismissal in

1840.  
BROWNE  
v.  
DAWSON.

a new trial. The facts of the case and the grounds of the motion will appear from the following judgment, which was now delivered by

Lord DENMAN C. J.—Three points were made by Mr. *Jervis* for a new trial in this case. The plaintiff had been master of a school, which was under the control of certain trustees, and, as such, had been allowed to occupy a school house, the subject of the alleged trespass: this had been built by a separate subscription, but it was admitted that, for the purposes of this cause, it must be considered as part of the school premises, and equally within the control of the trustees. In 1833, and after the plaintiff's appointment, they had drawn up certain rules; one of them provided for the master's dismissal in case of disobedience to the rest, and these rules the plaintiff had signed. For some alleged misconduct or unfitness for his office he had been dismissed, and acquiesced in his dismissal. This took place on the 28th June. The premises were then peaceably taken possession of by the trustees and locked up. On the 29th the plaintiff returned, and re-entered by force. On the 4th of July he was required by notice to depart, and persisting in remaining there he was ejected on the 11th, for which this action was brought.

The verdict passed for the defendants on the second plea, which denied the plaintiff's possession, the jury having been directed, that, if the plaintiff went out freely, and gave up possession on the 28th of June, he was not, under the circumstances, to be considered in possession within the meaning of the plea on the 11th of July.

It was first objected that the written rules could not be read in evidence unstamped; that they were the terms and conditions on which the plaintiff held his situation; that they therefore constituted an agreement, and ought to have been stamped as such. We are of opinion that there is no ground whatever for calling them an agreement within the

stamp act: no pecuniary value can be set upon them; such instruments must be numberless, and must have been and will be produced on trials again and again; it never has been the practice to stamp them, and to insist on stamping them would be full of inconvenience.

1840.  
BROWNE  
v.  
DAWSON.

It was then said that at all events the trustees could not dismiss the plaintiff in the middle of a quarter without calling on him for his defence. What was the precise tenure by which he held his office did not appear distinctly, but the facts, and his own acquiescence, seem to shew that he held during good behaviour. That acquiescence, however, is an answer to this objection; and it is but justice to add that there is no foundation for imputing hardship or injustice to the trustees.

The most important objection, however, was to the direction given to the jury with regard to the meaning of the second plea. Mr. *Jervis* urged, that the considerations which that involved were not open to the defendants under the language of the plea; that they must be considered as wrong-doers, as they set up no title, and, therefore, that, as against them, the barest possession was enough for the plaintiff; and *Heath v. Milward*(a) was cited in support of this argument. We think that case well decided, and agree that the question of title is not to be raised on a plea of possession. We agree also, that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrong-doer. But these elementary principles must be understood reasonably; a mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence, give himself what the law understands by possession, against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him; he had re-entered by a

(a) 2 Bing. N. C. 98; S. C. 2 Scott, 160.



1840.

**BROWNE**  
v.  
**DAWSON.**

trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st of July, he could as little have done on the 11th; for his tortiously being on the spot was never acquiesced in for a moment, and there was no delay in disputing it. But, if he could not have denied their possession in the action supposed, it follows clearly that they might deny his in the present action, for both parties could not be in possession.

We think, therefore, that the direction and the verdict were right, and there will be no rule.

Rule refused.

*Tuesday,*  
*Nov. 17th.*


**ABRAHAMS v. SKINNER.**

The defendant put his name as acceptor upon a blank bill stamp before the passing of the 3 & 4 Will. 4, c. 97, by which new stamps were substituted for those previously in use. After the day appointed for that act to come into operation, the other particulars requisite to constitute the paper a bill of exchange were added: *Held*, that it was not a perfect bill at the time the acceptance was written upon it, and therefore that the old stamp was insufficient.

**THIS** was an action by the indorsee against the acceptor of a bill of exchange, dated 14th August, 1835. Plea: non accepit.

At the trial before Lord *Denman* C. J. (at the sittings for London, after Mich. T. 1838), it appeared that the bill had been accepted by the defendant in blank (there being no drawer's name to it at the time) about June, 1833. On the 11th October, in the same year, the 3 & 4 Will. 4, c. 97, came into operation, by section 17 of which the stamp commissioners were authorized to fix a day, by notice in the Gazette, after which new stamps were to be used and the old ones to become inoperative. The drawing, the amount, and the other requisites of the bill in question, were added after the day fixed for the discontinuance of the old stamp. The question was, whether the bill was properly stamped, having the old stamp. The jury found that the bill was not complete at the time the act passed, but was only a paper with a bill stamp and a blank acceptance upon it; and they returned a verdict for the defendant.

*Jervis* had obtained a rule nisi to enter a verdict for the plaintiff, on the authority of *Snaith v. Mingay* (a), against which,

1840.  
  
 ABRAHAM  
 &  
 SKINNER.

*Humfrey* shewed cause (b), and relied upon *Downes v. Richardson* (c).

The arguments are fully stated and commented upon in the judgment of the Court, which was delivered on the last day of this term by

LORD DENMAN C. J.—This was an action on a bill of exchange against the acceptor, and, the issue being on the acceptance, a verdict passed for the defendant, upon an objection to the stamp. The date of the bill was August, 1835, and it bore a stamp impressed by a die which, under the 3 & 4 Will. 4, c. 97, s. 17, the commissioners of stamps had ordered to be discontinued in 1833. Upon the evidence at the trial, it must be taken that the acceptance had in fact been written in blank upon the paper before the discontinuance of the stamp, and the instrument completed afterwards. The question was, whether, under these circumstances, the stamp was now available; and we are of opinion that it was not.

The section of the statute in question provides that “all instruments, for the stamping of which any new die shall have been provided, and which, after the day so fixed, shall be written or printed upon paper, stamped with any other die than the new die so provided, and also all such instruments which, having been written or printed on paper, stamped as last aforesaid, shall not have been executed or signed by any party thereto, before or upon the said day so fixed as aforesaid, shall respectively be deemed to be written or printed on paper not duly stamped, as required by law.”

Upon the day when the old stamps were discontinued,

(a) 1 Mau. & S. 87.

ridge Js.

(b) Before Lord Denman C. J.,  
*Littledale, Williams and Cole-*

(c) 5 B. & Ald. 674; S. C. 1 D.  
 & R. 332.

1840.

ABRAHAM  
v.  
SKINNER.

the bill in question had in fact no existence; the defendant's name was written on a piece of paper, and he had given authority to some one to make him liable as acceptor of a future bill, to any amount which the stamp then on the paper would cover; but whether it ever would become a bill, and, if so, to what amount, and at what date, and in favour of whom, was uncertain. Everything that constitutes a bill of exchange, except the name of a drawee, written by himself, was written after the day in question—the drawer, the amount drawn for, the time limited for its running to maturity, the person in favour of whom drawn. Independently of any doctrine of relation, it is clear therefore that this bill falls directly within the words and meaning of the statute quoted above; but it was contended, upon the authority of *Snaith v. Minguy* (a), that the acceptance having been written before the discontinuance of the stamp, the bill, when completed, would have relation to that time, and so be taken to be a bill of that date. In that case, *Le Blanc J.* is stated to have said that, “when a signature is once written to a paper, which is intended to have the operation of a bill of exchange, it becomes such, when perfected, from the time when it was signed, so as to support an allegation that the party either drew or indorsed the bill.” That case has not, that we are aware of, been questioned, nor do we intend to dispute its authority; at the same time, we cannot but say that the doctrine of relation, which is in no case to be favoured, appears to us to be fraught with peculiar difficulties, when applied to bills of exchange. The difficulty in the present case may be said to be owing to an unusual circumstance, the change of stamp; but under the most ordinary circumstances it is calculated to introduce very embarrassing questions, highly unfavourable to the free and easy negotiation of these instruments, if any doctrine of law prevails which makes the requisite amount of stamp, or the period of maturity uncertain.

Leaving however that decision untouched, it appears to

(a) 1 Mau. & S. 37.

us that there is a substantial distinction between a blank drawing and a blank acceptance, as regards the doctrine of relation. The party who, with the intention of drawing a bill, writes his name at the bottom of the paper, does a part of the act of drawing, and when another person by his authority, at a subsequent period, fills in above the sum and date, and the time of currency, he does but complete the act which the party had begun; when completed it is all one act, and there is nothing unreasonable, in the absence of evidence of any contrary intention, in holding that the act shall date from the time when the most important part of it was written. But the drawing and the acceptance of a bill are two distinct acts; the latter is not essential to the completeness of the instrument, it may never be done at all, and when done there is no necessity for their being concurrent in point of time, no reason for considering them so in legal effect, and, of course, none for holding that the acceptance should draw back to itself, by relation, the time of drawing the bill where in fact it has preceded it. Upon these grounds we think that we ought to give effect to the plain words of the statute, and to hold this acceptance void for want of a stamp. The rule, therefore, will be discharged.

1840.

ABRAHAM  
v.  
SKINNER.

A.

Rule discharged.

DOR *d.* REES v. HOWELL.

Thursday,  
Nov. 12th.

THE defendant had obtained a rule nisi to set aside a cognovit given in an action of ejectment, and for a writ of restitution to issue, by reason of the provisions of 1 & 2 Vict. c. 110, s. 9, not having been complied with. The words of the act are, "that no warrant of attorney in any personal action or cognovit actionem given by any person shall be of any force &c." unless an attorney on behalf of the person executing the same shall have been present at the execution.

A cognovit given in ejectment is within the provisions of the statute 1 & 2 Vict. c. 110, s. 9.

1840.

DOE  
d.  
REES  
v.  
HOWELL.

*E. V. Williams* now shewed cause. He contended that the action of ejectment was not within the provisions of the statute, which was confined to personal actions. [Lord Denman C. J. The words are "warrant of attorney in any personal action or cognovit," not mentioning any class of actions as to the latter.] The words are so placed in the act, but both must apply to personal actions, and the Court will give such a construction to the act as will most effectually carry out the intention of the legislature.

*W. H. Watson* contra was stopped by the Court.

Per CURIAM (a).

Rule absolute.

A.

(a) Lord Denman C. J. *Littledale, Williams* and *Coleridge* Js.

Monday,  
November 23d.

### THE QUEEN v. BAINES.

The return to a habeas corpus set out a writ de con-

A HABEAS CORPUS had been obtained by the defendant, directed to the sheriff of Leicestershire, and to tumace capiendo, reciting the significavit of "*H. J. &c.* Official Principal, &c." which stated that the defendant, "*W. B.* of the Market Place in the borough of *L.*, a parishioner and inhabitant of the parish of *St. M.*, in the said borough of *L.*, in the county of *L.*, had been duly pronounced guilty of contumacy, &c. in not obeying the lawful commands to pay to &c., the churchwardens of the said parish of *St. M.*, the sum of *2L 5s*, rated and assessed upon him &c., pursuant to a monition duly issued under the seal of the said Arches Court, and duly and personally served on him the said *W. B. &c.*, of us the said *H. J.*, by not paying &c., pursuant to the said monition, in a certain cause or business of subtraction of church rate, depending &c., and the proceedings wherein were carried on in pain of the contumacy of the said *W. B.*, duly cited to appear in the said cause &c., with the usual intimation, but in nowise appearing, nor would he submit to the ecclesiastical jurisdiction:"—*Held*, 1, That the significavit, that the defendant was contumacious, was properly issued by the Official Principal of the Arches. 2, That, although the defendant had not appeared in the ecclesiastical court, this Court would not discharge him on habeas corpus, for, if it was the practice of the ecclesiastical court to give judgment against an absent party, there was nothing to shew such practice was illegal; and if the practice was not so, the remedy of the party was by appeal. 3, That it sufficiently appeared on the return that the suit was to enforce the payment of a church rate; and therefore that it was within the jurisdiction of the spiritual court. 4, That the subject-matter of the suit appearing to be *prima facie* within the jurisdiction of the spiritual court, this Court would not presume the existence of any facts which might either deprive the spiritual court of jurisdiction, or afford a defence to the party. 5, *Quere*, whether the defendant was correctly described according to *53 Geo. 3, c. 127*,

the keeper of the gaol of that county, in whose custody the defendant was confined. The return stated that the defendant was detained by virtue of a writ de contumace capiendo, as follows:

1840.  
  
 The QUEEN  
 v.  
 BAINES.

“ Victoria, &c. to the sheriff of Leicestershire, greeting. *Herbert Jenner*, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, hath signified to us that one *William Baines*, of the Market Place, in the borough of Leicester, hatter and hosier, a parishioner and inhabitant of the parish of St. Martin, in the said borough of Leicester, in the county of Leicester, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands to pay, or cause to be paid, to *William Fox*, the proctor of *William Jolly* and *William Berridge*, the churchwardens of the said parish of St. Martin, the sum of 2*l.* 5*s.* of lawful money of Great Britain, rated and assessed upon him, and the sum of 125*l.* 3*s.* of lawful money of Great Britain, being the amount of costs on their behalf, duly taxed and moderated, pursuant to a monition duly issued under seal of the said Arches Court, and duly and personally served on him the said *William Baines* for that purpose, and duly returned into the said Arches Court, with a certificate and affidavit of the execution thereof of the said *Herbert Jenner*, Knight, &c., Official Principal, &c. by not paying or causing to be paid to the said *William Fox*, the proctor of the said *William Jolly* and *William Berridge*, the said sum of 2*l.* 5*s.* and 125*l.* 3*s.*, pursuant to the said monition, on a day and hour now long past, in a certain cause or business of subtraction of church rate, depending before the said *Herbert Jenner*, Knight, &c. Official Principal, &c. in judgment, by

shed. (B), but held that the misdescription could not be taken advantage of upon motion to discharge the defendant, on a return setting out the writ, and on affidavit verifying a copy of the writ, as the proper course would have been to move to set aside the writ itself for irregularity. 6, That an indorsement on the writ, that it had been delivered of record to the sheriff of L., before our Lady the Queen, at &c., was sufficient within the statute 5 *Eliz.* c. 23, s. 2.

1840.  
  
 The QUEEN  
 v.  
 BAINES.

virtue of letters of request from the worshipful *Christopher Hodgson*, M. A., Commissary of the Right Reverend &c. *John*, by divine permission, Lord Bishop of *Lincoln*, in and for the archdeaconry of *Lincoln*, lawfully constituted between the said *William Jolly* and *William Berridge*, churchwardens of the said parish of *St. Martin*, in the borough of *Leicester*, in the county, archdeaconry and commissaryship of *Leicester*, in the diocese of *Lincoln* and province of *Canterbury*, the parties promoting the said cause or business of the one part, and the said *William Baines*, of the Market Place in the borough of *Leicester* aforesaid, hatter and hosier, parishioner and inhabitant of the said parish of *St. Martin*, the party against whom the said cause or business was promoted, of the other part, and proceedings wherein were carried on in pain of the contumacy of the said *William Baines*, duly cited to appear in the said cause or business, and also duly cited to see proceedings thereon, with the usual intimation, but in nowise appearing, nor will he submit to the ecclesiastical jurisdiction. But forasmuch as the royal authority ought not to be wanting to enforce such jurisdiction, we command you that you attach the said *William Baines* by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto us on the 11th of January, wheresoever we shall then be in England."

The writ had the following indorsement upon it:—"And be it known that the said writ, on Thursday, the 12th of November, in this same term, before our said Lady the Queen at Westminster, *was delivered of record* to the sheriff of Leicestershire, to be executed in due form of law."

The defendant brought the writ and significavit before the Court on affidavits.

Sir *J. Campbell* A. G., *M. D. Hill*, *Baines* and *Mellor*, now moved for the defendant's discharge (a).

(a) Before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

1840.

The QUEEN  
v.  
BAINES.

*First*, the *significavit*, which is recited in the writ de contumace, as set forth in the return to the habeas corpus, is insufficient, as having issued in the name of the official principal instead of that of the archbishop. The writ is given by the 53 Geo. 3, c. 127, s. 1, which abolishes the old writ de excommunicato capiendo, and enacts that, "in all causes which, according to the laws of this realm, are cognisable in the ecclesiastical courts, when any person or persons, having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, *shall neglect or refuse to appear*, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced, saving in the particular cases hereafter to be specified, but instead thereof it shall be lawful for the judges or *judge* who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same, in the form to this act annexed, to his Majesty in Chancery, as hath heretofore been done in signifying excommunications, and thereupon a writ de contumace capiendo, in the form to this act annexed, shall issue from the Court of Chancery, directed to the same persons to whom the writs de excommunicato capiendo have heretofore been directed, and the same shall be returnable in like manner as the writ de excommunicato capiendo hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ, and the proceedings following thereupon, and particularly the several provisions contained in 5 Eliz. c. 23, shall extend and be applied to the said writ de contumace capiendo, and



1840.

~.~  
The QUEEN  
v.  
BAINE.

the proceedings following thereupon, as if the same were herein particularly repeated and enacted, and the proper officers of the said Court of Chancery are hereby authorised and required to issue such writ de contumace capiendo accordingly, and all sheriffs, gaolers and other officers, are hereby authorised and required to execute the same, by taking and detaining the body of the person against whom the said writ shall be directed to be executed." This is a very stringent act, and a person detained under its provisions must remain in prison till the contempt for which he was committed is purged, as no insolvent act will release him; the consent of the prosecutor even will not be sufficient. The act therefore will be construed most strictly. By the old law the writ de excommunicato could not issue without a significavit from the ordinary, and a significavit by his commissary or official was not sufficient: *Bac. Abr. Excommunication*, (C); *Com. Dig. Excommengement*, (B 2), *Courts*, (N 3), *Ecclesiastical Persons*, (C 2); *Co. Lit.* 134 a; *Rex v. Fowler* (a); *Trollop's case* (b); 1 *Oughton*, *Ordo Judiciorum*, 74, tit. 43, n. g; 1 *Hale*, *Hist. Com. Law*, 35; 3 *Black. Com.* 102; *Gibs. Cod. Tit.* 39, p. 966; *Rex v. Ricketts* (c). The significavit formerly was, that the party had been excommunicated; it is now that he is contumacious, under the statute 53 *Geo. 3*; but that act expressly provides that the proceedings are to be conducted as formerly; it gives the form of the significavit to be adopted, in the schedule, which runs thus, " — by Divine Providence" &c., which clearly applies to archbishops, and not to an inferior officer. This objection falls within the general principle, that, where any one has to act as attorney for another, he must act in the name of the party from whom he derives his authority, and not in his own name: *Combe's*

(a) 1 *Salk.* 293; 1 *Ld. Raym.* 618.

(b) 8 *Rep.* 68 a.

(c) 6 *A. & E.* 541; *S. C.* 1 *N. & P.* 680, 685.

case (a), *Frontin v. Small* (b), *White v. Cuyler* (c), *Wilks v. Back* (d).

1840.

The QUEEN  
v.  
BAINES.

*Secondly*, the sentence against the defendant was pronounced without jurisdiction. It appears by the return to the habeas that a citation issued, but that the defendant did not appear; instead of thereupon pronouncing him contumacious, the Court proceeded against him *ex parte* and pronounced a final decision in the cause. Unless both sides are heard, there can be no judgment, although one of the parties may be proscribed for not appearing in obedience to the process of the Court: it is so in all codes of law, though in particular cases there are enactments by our legislature that proceedings may be had against a party in his absence. But the rule in the ecclesiastical courts is founded on the general principle: *Conset's Prac. Eccl. Courts*, 3d ed., pt. 2, pp. 35, 39, 41, 85; *Cockburn's Prac. Eccl. Courts*, (ed. 1800), p. 11. The only exception is in the proof of a will, which is not a suit *inter partes*, and where the Court may proceed without the appearance of the party; *Cockburn*, *Eccl. Prac.* 134; but that is not a case in which the party is to do any act, or where he can be punished for non-appearance: for, if the party cited does not come in, the only effect is that the will is proved in his absence. At common law, the legislature has enabled a plaintiff to enter an appearance for the defendant, upon proof of service of process; and a similar provision has been extended by Sir *Edward Sugden's Act* (e) to courts of equity; but no such power has been given in the ecclesiastical courts; the practice there is regulated by the 10 *Geo. 4*, c. 53; but that statute does not affect this point.

*Thirdly*, the *significavit* is bad for not sufficiently shewing that the defendant had been assessed to a church rate. It alleges that he was in contempt for not paying a sum of money, "rated and assessed upon him;" but, for anything

(a) 9 Rep. 75 a.

(c) 6 T. R. 176.

(b) 2 Stra. 705; 2 Ld. Ray.

(d) 2 East, 142.

1418.

(e) 11 *Geo. 4* & 1 *Will. 4*, c. 36.

1840.  
  
 The QUEEN  
 v.  
 BAINES.

that appears to the contrary, this might have been a poor rate, a borough rate, or a highway rate. It ought to have appeared that the defendant was assessed not only to a church rate, but to a rate for the repair of his own parish church; in such a case nothing is to be taken by intendment, but the jurisdiction of the Court must be clearly made to appear: *Rex v. Eyre* (a). [Coleridge J. In a subsequent part of the writ it is stated, that there had been a monition "in a certain cause or business of subtraction of church rate."] The jurisdiction of the ecclesiastical court ought to be shewn in that part of the significavit where the order to pay is stated. If the allegation of jurisdiction is deficient, it cannot be supplied by evidence: *Rex v. Fowler* (b), *Reg. v. Hill* (c), *Reg. v. Baynes* (d), *Rex v. Maby* (e), *Rex v. Dugger* (f), *Bruyeres v. Halcomb* (g), *Reg. v. Ricketts* (h). In this case also the sum demanded is under 10*l.*, and therefore prima facie it is taken out of the jurisdiction of the ecclesiastical court by 53 *Geo. 3*, c. 127, s. 7: *Ricketts v. Bodenham* (i).

*Fourthly*, the writ does not follow the form given in the schedule to the 53 *Geo. 3*, c. 127, which is as follows: "That — of — in your county, is manifestly contumacious;" the writ in this case states, "that one *William Baines*, of the Market Place, in the borough of Leicester, hatter and hosier, a parishioner and inhabitant of the parish of St. Martin, in the said borough of Leicester, in the county of Leicester, is manifestly contumacious." A rigid compliance with the form given by an act of parliament is always required: *Richards v. Stewart* (k). It may be that part of the borough of Leicester is in the county of Warwick, and the Court

- |   |   |
|---|---|
| (a) 2 <i>Str.</i> 1067.                                   | (g) 3 <i>A. &amp; E.</i> 381; 5 <i>N. &amp; M.</i> 149. |
| (b) 1 <i>Salk.</i> 293; 1 <i>Ld. Ray.</i> 618.            | (h) 8 <i>A. &amp; E.</i> 951; 1 <i>P. &amp; D.</i> 150. |
| (c) 1 <i>Salk.</i> 294.                                   | (i) 4 <i>A. &amp; E.</i> 433; 6 <i>N. &amp; M.</i> 170. |
| (d) 1 <i>Salk.</i> 680.                                   | (k) 10 <i>Bing.</i> 319; 3 <i>M. &amp; Scott,</i> 774.  |
| (e) 3 <i>D. &amp; R.</i> 570.                             |   |
| (f) 5 <i>B. &amp; Ald.</i> 791; 1 <i>D. &amp; R.</i> 460. |   |

will not take judicial notice of the local situation of the different places in the counties of England: *Deybel's case* (a). [Coleridge J. Why should the Court make an intendment against the plain English of the writ?] The question might rather be asked, why should not the writ follow the plain words of the statute?

1840.  
  
 The QUEEN  
 v.  
 BAINES.

*Fifthly*, the 53 Geo. 3, c. 127, provides that the party is to be signified in contempt, "as hath heretofore been done," and expressly provides that all proceedings shall be conducted as required by the 5 Eliz. c. 23, which relates to the writ de excommunicato. Now that statute enacts, (s. 2), "that every writ of excommunicato capiendo that shall be awarded out of the Court of Chancery against any person, shall be made in the time of term, and returnable in the King's Bench in the term next after the teste of the same writ, and, after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said Court of King's Bench, and there, in the presence of the justices, shall be opened and delivered of record to the sheriff, &c." That act, therefore, which is in favour of liberty, should be strictly pursued, but from the indorsement on the writ it appears that it was "delivered of record to the sheriff," instead of being "*opened* and delivered of record to the sheriff *in the presence of the justices*," who are then supposed to have an opportunity of deciding on its regularity.

*Wightman contra.* The 53 Geo. 3 is express that "the judge" who issues the citation is to signify the contempt to the Court of Chancery; and, unless it can be contended that Sir *Herbert Jenner* is not a judge of the ecclesiastical court to do any of the acts contemplated by the statute, the first objection must fail. In *Jolly v. Baines* (b) it clearly appeared from the affidavits used by the defendant himself that the citation had been issued by Sir *Herbert Jenner*. There is a distinction between the office of official and vicar-general, as also between contentious and

(a) 4 B. & Ald. 243.

(b) *Ante*, 224.

1840.

The QUEEN  
v.  
BAINES.

voluntary jurisdiction: in the former class of causes process always issues in the name of the official: 2 *Gibs. Cod.* 986, 990; citing *Stillingfleet*, 60 (ed. 1698.) At most, this objection is one of irregularity in the ecclesiastical court, of which this Court will not take notice. The writ itself is not before the Court, though no doubt it is set out in extenso in the return. The answer therefore to the first objection is briefly this, that the judge, by whom the party is cited and by whom the decree is made, is required to signify the contempt to the Court of Chancery. If the citation in this case had been by the archbishop, there might then have been some ground for the argument that the *significavit* had not been issued by the same person who had issued the citation.

*Secondly.* It is objected that there has been a final decree here before the defendant has appeared; but, by the 10 *Geo. 4*, c. 53, s. 9, the judges of the ecclesiastical courts are authorised to regulate their practice in such matters; and the course which has been adopted in this case is the recognized practice of the courts. [An affidavit by a proctor was produced to this effect.] Can this Court say that all the proceedings in the ecclesiastical court are void, because sentence has been pronounced against a contumacious party in his absence, he having been duly served with process in the first instance? The principle of such a proceeding was recognized in *Becquet v. Mac Carthy* (a). [Lord Denman C.J. That was supposed to be the law by the Code Napoleon, and the question for us was, whether we could say that it was unreasonable.] The same reasoning will apply here. *Ex parte Smyth* (b) is also in point. [Littleton J. It appears that before the 53 *Geo. 3* the certificate could only be made by the bishop: then how is the law altered by that statute? The king writes to the bishop to absolve the party.] The argument is, that the official principal acts as the judge, and is so in fact, and

(a) 2 B &amp; Ad. 951.

(b) 3 A. &amp; E. 719; 5 N. &amp; M. 145; 2 C., M. &amp; R. 748.

1840.  
  
 The QUEEN  
 v.  
 BAINES.

is his duty therefore to make the certificate. The of the act probably was to get rid of the old forms, do away with the absurdity of making a party, who is only nominally a judge, certify matter of which he knows nothing. [Coleridge J. The form in the schedule is only given as an example, for it says "by Divine Providence," not "by divine permission;" and it applies there- to archbishops only, and not to bishops.]

It quite sufficiently appears that the proceedings in the ecclesiastical court were in respect of a church rate; shewn by the recital of the certificate; and there is nothing there to shew that final judgment had been given in the cause. As to the objection, that there is no authority to shew that this church rate being under 10*l.* was within the jurisdiction of the ecclesiastical court, it is sufficient to say that the ecclesiastical courts have the general jurisdiction over all matters of church rate, which is expressly reserved by the 53 Geo. 3, c. 127, by which a special jurisdiction only is given to the justices; and it is competent for any party summoned before them, by disputing the validity of the rate, to remove the matter from their jurisdiction: *Rex v. Milnrow* (a).

It is further shewn that the defendant is also sufficiently described as being of the county of Leicester, for he is stated to be of the parish of St. Martin in the borough of L.: it clearly therefore follows that the borough is in the county: the whole of the statement must be taken together. If the words given in the form in the schedule, "in your county," had been strictly followed, the same difficulty would have arisen. [Coleridge J. The objection here appears to be that the words "in the county of Leicester" may apply to the parish of St. Martin only, and that they do not necessarily apply to the borough. Lord Denman C. J. If the form in the statute had been strictly followed, we might have been bound to put some intendment on the words, in this case have been departed from.]

(a) 5 Mau. & S. 248.

1840.

The QUEEN  
v.  
BAINES.

*Fifthly.* It is said that it should have been shewn that the writ was opened before the judges. That is sufficiently stated in the indorsement; but at any rate it lies on the other side to shew that the contrary was the fact.

Sir *John Campbell* A.G. in reply. The defendant is not necessarily confined to objections on the face of the return: it is competent to a party brought up on habeas corpus to shew what proceedings have taken place; *Reg. v. Dunn* (a); and *Onslow's* act (b) enables a party to controvert the facts set out on the return by affidavit. It is admitted on the other side that, before the 53 *Geo. 3*, c. 127, the significavit must have been made in the name of the ordinary. It is clear that the statute has not altered the law in this respect, though it has substituted another writ. A distinction has indeed been attempted to be drawn between the official principal and the other representatives of the bishop: but is it contended that the bishop is to certify and not the archbishop? In *Reg. v. Thorogood* (c) the significavit was by the bishop, although the citation was to appear before the Official. The significavit therefore in that case would have been bad unless the bishop *might* certify; and if he *might*, he clearly *must* do so. In *Walker v. Leters* (d) (cited in *Vin. Abr. Excommunication* (D), 5, n.), "*Fairfax* said, that what the commissary does is all the act of the bishop, and as strong in law, &c.; to which *Needham* agreed, but said that then it ought to be certified in the name of the bishop, for the certificate of the commissary may [not] disable the person, if he be not commissary of record, but [otherwise it is of] the archdeacon of Richmond in time of vacation, and the dean and chapter of Canterbury in time of vacation, &c., and a certificate by them is allowable here, but not of this commissary, &c. But a testament proved before the commissary is good enough; quod *Danby* and others concesserunt, &c." [Lord

(a) See *post*, 415.

(c) 3 P. &amp; D. 629.

(b) 56 *Geo. 3*, c. 100, s. 3.(d) 7 *Edw. 4*, 14, a. pl. 6.

C.J. There appear to be some strange interpolations in that judgment (a).] With regard to the affidavit which has been produced, it sets up a practice in the ecclesiastical court which is contrary to all law and natural justice and which this Court will never uphold: *Williams v. Bagot* (b). The statute 10 Geo. 4, c. 53, was made *alio intuitu*; it only gives the ecclesiastical courts power of lengthening their terms and making some alterations in their practice, but it does not confer any new power as is here set up. In *Becquet v. Mac Carthy* there had been a service of process on the attorney-general of the colony, who by the law there was for that purpose treated as an agent of the party. It is argued that no final decree is in fact shewn in this case: but if so, it follows that the defendant must be dismissed, for the derelictum charged is *non-payment* in pursuance of a decree, and not the defendant's *non-appearance*. And it will be perceived that the church rate was one in which the ecclesiastical court had jurisdiction, because the court has jurisdiction over every church-rate; but in *Veley v. Veley* (d), which was a suit for the subtraction of a church rate, the same as the present case, this Court decided that a church rate having been made without proper authority, the ecclesiastical court had no jurisdiction over it; and not only so, but that this was such a rate. As to the objection to the description of the defendant's residence, nothing has been advanced to shew that what has been introduced in the plea is equivalent to the words of the act.

1840.  
  
 The QUEEN  
 v.  
 BAINES.

*Cur. adv. vult.*

*Viner* subjoins the following note:—"What is added in the crotchets [ ] not in the last or old edition of the Books, and the sense is imperfect, &c. without it, and is intended to add it; but, if the Court thinks I am wrong in saying so, wherever I do in the

like manner, he has it laid plainly before him, to put his own construction upon it, and take it which way he likes best."

(b) 3 B. & C. 772; S. C. 5 D. & R. 719.

(c) 2 B. & Ad. 951.

(d) *Post*.



1840.

The QUEEN  
v.  
BAINES.

Lord DENMAN C. J. this day intimated that upon looking into the authorities, the Court were clearly of opinion that the official principal was the proper person to signify the contumacy of the defendant.

Lord DENMAN C. J., at the sittings after term (Nov. 28), delivered the following judgment :—

This defendant was brought before us by writ of habeas corpus; the return was, that he was imprisoned by the Spiritual Court by reason of his contempt in not paying 2*l.* 5*s.* for a church rate, and 125*l.* 3*s.* costs in a suit for the subtraction of tithe, and that upon a significavit from Sir H. Jenner, the Dean of the Arches, the writ de contumace capiendo had issued under 53 Geo. 3, c. 127. A copy of the significavit and of the writ on which he was apprehended were also brought before us by affidavit, and many objections were taken to the legality of his detention.

The first objection is to the significavit as being issued by Sir H. Jenner, Dean of the Arches, and not by the archbishop himself, the real though not the acting judge of the Court, nor in his name.

The statute just quoted was referred to, by which the contumacy of a party is directed to be signified, in the form annexed to the act, to his Majesty in Chancery "*as had theretofore been done in signifying excommunications:*" and then it was shewn that the 5th Eliz. requires the significavit to be issued by the judge himself (a). This last-mentioned statute appears in Co. Lit. (133 b) to have been passed for correcting the laxity that had crept into practice, by which the acting judge was permitted to certify excommunication. On examining his authorities cited in the margin, we find Bracton expressly declaring (lib. 5, fo. 426, b), that the cer-

(a) It is apprehended that this reference ought to have been 134 a, where the subject of excommunication introduced by Littleton in §. 201, is largely discussed by Lord Coke. He does not, however, say that 5 Eliz. was passed with the in-

tention stated, but more probably refers to a declaration by parliament mentioned in Y. B. 11 H. 4, 64 a, and also in Trollop's case, 8 Rep. 68. The correction of the existing practice was undoubtedly the general object of 5 Eliz.

1840.

The QUEEN  
v.  
BAINES.

ificate should proceed from the archbishop, bishop, or from the ordinary or delegated judge. Some of the cases cited here from the Year Books clearly shew the general rule to be that the judge himself, *i. e.* the bishop, who alone could absolve the excommunicated, should certify to this Court, as his immediate officer, the sentence. In some instances, even in those early times, it appears that the certificate of a delegated judge had been received, and the statute of 5 *Eliz.* brought back the original practice. It was argued for the defendant that the form of the *significavit* itself, as given by the 13 *Geo. 3* in the schedule, proves that the judge, *i. e.* the ordinary, is the only person who ought to certify as “ — by Divine Providence —,” is a form that can only apply to an archbishop. It would indeed be singular, if any change in this respect had been intended, that it should have been nowhere indicated in the enactments of the statute, and that his style and title should have been carefully preserved by it. Yet such form, though embodied in the act, cannot be deemed conclusive of a question of this nature. We have also to consider the language of the section itself to which the schedule is appended, and, if there be any contradiction between the two, which upon fair construction perhaps here will not be found to be, upon ordinary principles, the form, which is made rather to suit the generality of cases than all cases, must give way. Now in the form itself “ the judge or his representative” are both mentioned as capable of making orders, giving judgments, and having a court, in the face of which a contempt may be committed; and the *significavit* is expressly required by the first section to be made by the judge who issued the citation, whose orders have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, and it is expressly that judge who is authorised to pronounce the party in contempt and contumacious. All three cases are put upon the same footing; and, when the nature of a contempt in the face of the Court comes to be considered, there seems something amounting to an inconsistency in holding that, when a contempt had been committed before a judge ac-

1840.


The QUEEN  
v.  
BAINES.

tually sitting in Court, it shall be necessary to call for the archbishop, who had not been present, to pronounce the party in contempt, and then to signify. We may observe too that there was a reason for the former practice, when the sentence of excommunication, a strictly spiritual sentence, was to pass, which does not exist in the present state of the law. What effect, however, is to be given to the words of the schedule in the case of proceedings of judges in their several Courts we need not now positively decide, having ascertained upon inquiry that the Archbishop of Canterbury never has certified any thing to the Court of Queen's Bench as judge of his Court, but that such certificates have uniformly been given by the Dean of Arches. There is a remarkable instance of the difference between the Court of Arches and a Bishop's Court in a case of deprivation reported in 1 *Phillimore*. That sentence was orally pronounced by Sir *W. Scott* in the presence of the Bishop of London: but on appeal it was confirmed by Sir *J. Nichol*, as Dean of the Arches, or more properly as Official Principal to the Archbishop of Canterbury, who took no part, and whose name never appeared, in the proceedings. We are also informed that this very objection was made without success in the Court of Chancery to the issuing of the writ de contumace in *Rex v. Ricketts*. We are led then to conclude that "the judge who made the citation" in the Court of Arches is the Dean of Arches, and that he is the officer whose authority is preserved by 53 *Geo. 3*. And it is not a wholly unimportant circumstance, in an argument which relies on the precise language of the schedule, that the style of the judge there given, though applicable to archbishops, does not accurately agree with the style of bishops.

The second objection was, that the act of the Court was in itself repugnant to the first principles of justice, as the defendant had never appeared, and was condemned to pay the rate and costs, though he had only been brought into contempt for that reason, and had not been heard in his own defence. But we cannot say that this is necessarily wrong: a court must, in some cases, proceed against those

who do not choose to appear when duly served with notice, even to the extent of adjudging them to do the very thing which, if they had appeared, they might have shewn a justification for leaving undone. A plaintiff may enter an appearance for a defendant in our courts; a defendant in a Chancery suit, who is in contempt for failing to answer, is taken to confess the charges in the bill. Both these are statutory powers, but they sufficiently prove that such condemnation of the voluntary absent is not a violation of natural justice; and the practice of the ecclesiastical court may give all just and reasonable protection to defendants. Whatever is complained of is either according to the practice of the ecclesiastical court or it is not. If it be the former, the observations just made apply, it is a course of proceeding which we cannot presume to be illegal, for it must then be taken to have been sanctioned by their law and immemorial usage, equivalent to statute; or, if not to be considered legal, the defendant's course was to come here for a prohibition. But if it be contrary to their practice, which was the line taken in argument for the defendant, and for which many strong authorities were cited, then it is clear that the proper remedy for the defendant is to appear and appeal to some higher court, in order to reverse an erroneous judgment: his present application leaves the judgment in full force.

The next objection was, that the jurisdiction of the ecclesiastical court does not appear on this return. *Prima facie* it certainly does appear, for the cause is described as one for subtraction of church rate—a matter clearly within the jurisdiction of the ecclesiastical court. In the case of *Rex v. Fowler* (a), where the description “pro subtractione decimarum vel aliorum jurium ecclesiasticorum,” was held bad for uncertainty, *Holt* expressly declares his opinion (620), that if it had been pro subtractione quorundam jurium ecclesiasticorum it would have been good. The case of *Rex v. Dugger* (b), founded on former decisions, merely

1840.  
  
 The QUEEN  
 v.  
 BAINES.

(a) 1 Salk. 293; 1 Ld. Raym. 618.

(b) 5 B. & Ald. 791; S. C. 1 D. & R. 460.

1840.

  
 The QUEEN  
 v.  
 BAINES.

established the proposition, that vague and unmeaning language, not correctly pointed to describe any cause whatsoever, cannot be stretched into a description of an ecclesiastical cause by general words so claiming it.

It was next objected, that the *significavit* does not set out a proceeding for a church rate, or shew that the commands disobeyed were lawful, as a church rate can only be due from a parishioner, which the defendant is not stated to be; and further, that, even if that did appear, it may still be such a church rate as the court spiritual has not cognizance of by force of the 53 *Geo. 3*, from its being under 10*l.* in amount, and not disputed.

The same answer will serve for both these objections. The return properly describes the subject-matter of a suit over which the Court of Arches *primâ facie* has jurisdiction, and it is properly described in the return. When the Court assumes to act within its jurisdiction, and facts appear which *primâ facie* give it jurisdiction, we are not to presume the existence of other facts which might either deprive the Court of jurisdiction, or, if true, be a defence for the party libelled.

Some objections were lastly taken to the form of the writ, as not being that prescribed by 53 *Geo. 3*. We thought it possible that, in conformity to more recent practice, we might arrive at the conclusion of the insufficiency of the writ on argument on the habeas corpus; and that, if we should deem it invalid, the defendant might immediately obtain his liberty. But on a fuller investigation we cannot find that this has been done in any case; and may observe, that in *Rex v. Ricketts*(a), where the defendant was discharged on objection to the writ, it was not taken on the return to a habeas corpus, but on a motion to set aside the writ itself for irregularity. In the argument in the present case Mr. *Wightman* urged, that we were not at liberty to enter into the consideration of it, as it was not set out upon the return, nor itself brought before us except by means of a copy verified by affidavit. And we are of that opinion;

(a) 6 A. & E. 951; 1 P. & D. 150.

in the position in which the case now is, we have it not in our power to quash the writ, and we cannot direct the defendant to be discharged upon this return while the writ remains in force, and so far as appears upon the return not open to objection.

We need not therefore pronounce any opinion upon the point made in this respect, further than to guard ourselves against being supposed to pronounce indirectly in favour of the form very needlessly substituted for the express words of the schedule; and we leave it entirely open to the defendant to make such direct application as he may be advised to make against the writ.

To the objection that the writ was not opened in this Court before delivery to the sheriff we attach no weight.

Upon the whole therefore we are of opinion, that the return must now be taken to be sufficient, and the prisoner must be remanded.

*A.* Prisoner remanded (*a*).

(*a*) See *In re Baines*, 1 Craig & Ph. 31.

### EARDLEY v. LAW.

A RULE nisi had been obtained in Trinity term last calling upon the defendant and *Henry Pershouse* and *Robert Harrop*, members and partners of the co-partnership of the Imperial Bank of England, to shew cause why a writ or writs of scire facias upon the judgment obtained by the plaintiff in this cause should not issue against the said *H. Pershouse* and *R. Harrop*, as members and partners of the said co-partnership.

The following facts were stated in the plaintiff's affidavit upon which the rule was obtained:—In the month of December, 1836, a company of shareholders established a banking

ci. fa. under the 13th section, unless it is made to appear that he has really and bona fide attempted to enforce the judgment against the members *for the time being*.

1840.

The QUEEN  
v.  
BAINES.


Nov. 27th.

Where a plaintiff has recovered judgment and sued out a fruitless execution against the public officer of a banking company under 7 Geo. 4, c. 46, the Court will not give the plaintiff leave to proceed against former members by

1840.  
EARDLEY  
v.  
LAW.

company by the name of *The Imperial Bank of England*, pursuant to the provisions of the statute 7 Geo. 4, c. 46. In May, 1838, the plaintiff deposited the sum of 1250*l.* in the bank at interest. In April, 1839, the bank stopped payment. In May, 1840, the plaintiff commenced the present action against the defendant, who was the registered officer of the bank, and on the 1st of June following final judgment was signed; and on the same day a writ of *fi. fa.* was issued against the defendant, to which a return was made of *nulla bona* four days afterwards. The plaintiff also stated in his affidavit, that the whole of his demand remained unpaid, and that he was not aware of any property of the defendant from which he might obtain payment; for, from inquiries he had made, he believed the defendant had not any property upon which execution could be levied: that he had been informed that several executions had been issued in actions by creditors of the co-partnership against the public officer, under some of which the effects of the defendant had been seized and sold, and that there was not, to the plaintiff's knowledge or belief, any property or effects belonging to any of the present members of the co-partnership whose names were included in the returns delivered to the stamp-office in April, 1839, or whose names were mentioned in any subsequent returns to the stamp-office made by the co-partnership, which could by any execution, which might be issued in that action against any members of the co-partnership for the time being, be seized and sold to satisfy the plaintiff's judgment: that upwards of thirty of the members had been declared bankrupts: that he had made diligent inquiry and used every means in his power to acquire information respecting the solvency and circumstances of the members for the time being of the co-partnership whose names were included in any return in and subsequent to April, 1839; and that he believed that any execution against any of them upon the said judgment would be wholly ineffectual for obtaining payment or satisfaction of the amount of such


judgment. And the affidavit concluded by shewing that the parties against whom the present application was made were shareholders in May, 1838, when the plaintiff's money was deposited.

1840.  
  
 EARDLEY  
 v.  
 LAW.

The principal affidavit in answer was made by Mr. *Pershouse*, and stated that his name did not appear in the returns made in 1839 or 1840: that the return made in the former year contained one hundred and thirty-two names, and the return of 1840 one hundred and thirty-one members of the co-partnership, many of whom were, as deponent believed, solvent and able to satisfy the plaintiff's judgment; and that there were property and effects belonging to the present shareholders in the bank, whose names were included in the last mentioned return, which might be seized and sold by virtue of an execution in that action against such shareholders to satisfy the plaintiff's alleged debt and costs; and that executions issued upon his judgment against such shareholders or some of them would, if enforced with due diligence, be effectual for obtaining payment and satisfaction of such judgment: that he believed that several of the partners who had so become bankrupts as stated, and in particular several of them who were directors of the bank, possessed property much more than sufficient for the payment of their private debts, and that some of them had become bankrupts with a view of obtaining a discharge from the liabilities of the bank; but that there were then divers members of the bank whose names were included in the returns in 1839 and 1840 who were solvent and responsible, and fully able to meet and pay the amount alleged to be owing upon the plaintiff's judgment. The deponent then set out the names and addresses of sixteen persons whose names were included in the last mentioned returns, and who he stated he believed to be so solvent and responsible.

*Cresswell* and *Crompton* now shewed cause. The present application is made under the 13th section of 7 Geo. 4, c. 46, which enacts, "that execution upon any judgment in




1840.  
  
 EARDLEY  
 v.  
 LAW.

any action obtained against any public officer for the time being of any such co-partnership carrying on the business of banking under the provisions of the act, whether as plaintiff or defendant, may be issued against any member for the time being of such co-partnership; and that, in case any such execution against any member for the time being of any such co partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party so having obtained judgment against any such public officer to issue execution against any person who was a member of such co-partnership at the time when the contract or engagement in which such judgment may have been obtained, was or were entered into or become a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted on motion in open court by the court in which such judgment shall have been obtained." The affidavits shew that the parties against whom the application is made were not in fact partners in the concern. [Lord Denman C. J. Would not that properly be a matter of defence?] The Court has only jurisdiction to issue a scire facias under certain circumstances; the execution in the first instance is to be issued against any members of the company "for the time being," that is, at the time the execution issues, not at the time the judgment was obtained; for the latter part of the section provides, that if the plaintiff fails to obtain payment from such members, he may then resort to those parties who were members at the time of the judgment obtained. In *Cross v. Law* (a) Alderson, B. intimated that it was proper the Court should see that there had been a bonâ fide attempt made to fix all the members of the company for the time being, before any execution were allowed to go against members not in that condition. [Coleridge J. Is it contended then that there

(a) 6 M. & W. 217, and see *Bosanquet v. Ransford*, 3 P. & D. 298.

must be executions against all the existing members before an execution can go against these parties?'] At any rate the Court will require to be satisfied that there has been a bonâ fide attempt to obtain satisfaction from the existing partners before they will allow it to go against the late partners: as to the partners for the time being, a sci. fa. may issue against them without the leave of the Court, but the act expressly requires that such leave shall be obtained before execution is to issue against the latter class; this distinction was pointed out by Lord Abinger C. B. in *Cross v. Law* (a). In this case it does not appear that there has been an execution against any one member "for the time being;" for there is nothing to shew that *Law* was a member when the execution issued.

1840.  
  
 EARDLEY  
 v.  
 LAW.

*Wightman* contra. If the argument on the other side were to prevail, a creditor of the bank would be placed in a situation of the greatest difficulty. It is said there is a number of solvent partners, against whom execution should issue in the first instance; but, if that course were adopted, they might turn round and say, they had ceased to be partners before execution. In this case every ground of defence is open to a defendant upon the scire facias. [*Lit- tledale J.* Could a defendant on scire facias shew that there were other solvent partners against whom an execution might be had? The other side will contend that there ought to have been a bonâ fide attempt to get payment from the solvent partners in the first instance.] That would lead to a most inconvenient inquiry in every case whether or not execution had been taken out against the most solvent partners. [Lord Denman C. J. Has there in fact been execution issued against any member? How is the Court to know that *Law* is a member?'] In a recent case in the Exchequer it was considered that it might be assumed that a public officer was a member unless the contrary were shewn (a). [*Coleridge J.* The act clearly

(a) See *Harwood v. Law*, 7 M. & W. 203.

1840.

~  
EARDLEY  
v.  
LAW.

requires that some bonâ fide attempt should be made to obtain payment from the existing members. Is there any thing to satisfy the Court that such an attempt has been made in this case? Your construction of the act would really make the first execution a mere matter of form.] It cannot be known which of these parties are solvent, or which are actually members; for it might be that their names had been inserted in the returns without their consent. It is sufficient therefore if execution is taken out against any one member, and, if that proves ineffectual, the plaintiff has a right to proceed under the act against any former member; and in the present case it must be taken for granted, unless the contrary were shewn, that the defendant, the public officer of the Company, was a partner; and execution having in the first instance been taken out against him, all was done that was necessary to entitle the plaintiff to have execution against the former partners.

LORD DENMAN C. J.—If the opinion of the Court is wrong that a scire facias should issue in this case, the parties can allow execution to issue, and can then take the opinion of a higher tribunal; but I think it right that the sci. fa. should go. I agree with what was stated by *Alderson B.* in *Cross v. Law (a)*, that there should be a bonâ fide attempt by the plaintiff to obtain satisfaction of his judgment from the members for the time being before he resorts to the late members; and the question here is, whether such a bonâ fide attempt has been made. And I am of opinion that no such attempt has been shewn; and that it would be unjust upon the parties against whom the present application is made to hold them liable in the existing state of affairs. If indeed it had appeared that the plaintiff had sued those parties whom he bonâ fide believed to be solvent, or that he had sued out execution against the defendant in the action alone, and upon inquiry had been


(a) 6 M. & W. 217.

persuaded that he could not obtain satisfaction from any of the other members for the time being; in such a case it is probable we might allow the execution to issue against the former partners; but in this case, where it appears that there are more than 130 existing members, and that only one of them is sued—(assuming the defendant *Law* to be a member), and that he is in a state of decided insolvency, and that on the other hand there are several of these existing members named who are stated to be in a state of solvency, I think it would be too much to grant the present application.

1840.  
EARDLEY  
v.  
LAW.

**LITLEDALE J.**—By the statute the primary liability is properly thrown on the existing shareholders; but at the same time those parties who were members at the time the contract was entered into, but who have since ceased to be so, are not discharged from their liability; but they are only secondarily liable, and the act declares they shall not be proceeded against without the leave of the Court. In this case a *sci. fa.* is applied for against parties who are only thus secondarily liable; and the question is, whether the plaintiff has shewn a sufficient attempt on his part to fix the parties who are primarily liable. Now all that has been done by the plaintiff is to issue execution against the public officer of the concern, who is in a notorious state of insolvency, without any attempt being made to obtain satisfaction from the other existing members. I cannot consider that sufficient under the act. I do not mean to say that I think it necessary to sue out execution against each individual member, but I think at least something more should be done than appears to have been done in this instance.

**WILLIAMS J.**—I am of the same opinion. The question is, whether enough has been done in this case to recover the judgment from the parties who are primarily liable. It appears to me that nothing has been done to enforce the

1840.  
  
 EARDLEY  
 v.  
 LAW.

judgment against them, and that therefore the Court has no discretion to exercise on the matter.

COLERIDGE J.—The statute makes a clear distinction between those parties who are primarily liable and those who are secondarily so; and the parties against whom this application is made obviously belong to the second class; for Mr. *Wightman* seemed driven to contend that a mere *pro formâ* execution was all that was necessary in the first instance in order to make the former members liable; but the adoption of such a course would, I think, stultify the act of parliament; for the consent of the Court is required before an execution can issue against parties of the second class. But, if a mere formal act were sufficient in the first instance, there would be no reason why the execution should not be allowed to go at once without the interposition of the Court. I think therefore that some *bonâ fide* attempt to satisfy the judgment as against the existing members is necessary before the Court will assist plaintiff to issue execution against parties who have ceased to be members; and, without laying down what the minimum would be to satisfy the act, I think it sufficient to say that in my opinion sufficient has not been done in this instance.

A.

Rule discharged.

Wednesday,  
 Nov. 25th.


#### DRURY v. HOUNDSFIELD.

Where an order has been made by the Insolvent Court under the 37th sect. of the Imprisonment for Debt Act (1 &

A RULE had been obtained in last Michaelmas term, calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Yorkshire, and why the plaintiff should not pay the costs of the application.

2 Vict. c. 110), vesting the insolvent's estate in the provisional assignee, the detaining creditor is not bound to accept the amount of debt and costs tendered on behalf of the insolvent, where it does not distinctly appear that the money tendered is no part of the insolvent's estate; and the Court will not order the insolvent's discharge on affidavit of such tender and refusal.

The following facts were disclosed by the affidavits: The defendant being in custody on mesne process at the plaintiff's suit, a detainer in execution was lodged against him in September, 1838, in the same action, for 140*l.* debt and costs. In October following, the plaintiff, on petition to the Insolvent Court, obtained an order, vesting the defendant's estate and effects in the provisional assignee, under section 37 of the Imprisonment for Debt Act (1 & 2 Vict. c. 110). In the following November (at which time the defendant had not filed his *schedule*), the clerk of the defendant's attorney, accompanied by the defendant's wife, tendered the debt and costs to the plaintiff, but he declined receiving them, upon the ground that the order above mentioned had vested all the defendant's estate and effects in the provisional assignee. It was stated by the defendant's wife, that he had obtained the money with which the tender was made from one *Anderson*, who was a friend of the defendant's, by means of a check, drawn on *Anderson's* banker.

1840.  
  
 DRURY  
 v  
 HOUNDSFIELD.

*Cresswell* and *Martin* shewed cause (*a*). The present case has already been before the Court in another shape: *Houndsfield v. Drury* (*b*). The only question here is as to the effect of the vesting order, under the 37th section of the Imprisonment for Debt Act, which enacts that such an order shall, without any conveyance or assignment, vest all the real and personal estate and effects, of every nature and kind whatsoever, and all debts of the insolvent, in the provisional assignee. The other side were bound to shew distinctly that the money was *Anderson's*, and in failure of such proof it must be taken to be the insolvent's, and therefore had passed to his assignees by virtue of the vesting order of the Insolvent Court. The intention of the act was to compel a debtor, who remained in jail and set his creditors at defiance, to assign his property for the benefit

(*a*) Before Lord Denman C. J.,      (*b*) 3 P. & D. 127; S. C. 11 A.  
*Littledale, Williams and Coleridge*      & E. 98.

1840.



DRURY

v.

HOUNDSFIELD.

of his creditors. The vesting order is in place of the assignment from the insolvent, under the former insolvent acts, and it vests in the provisional assignee all the interest the insolvent had in his estate at the time such order was made: *Woodland v. Fuller* (a). In *Crozer v. Pilling* (b), which will be relied upon by the other side, no question was raised as to whether the money belonged to the debtor or the assignee. If the creditor had taken the money he would have been obliged to refund it to the assignee.

Sir *W. W. Follett* and *Newton* contra. According to the argument on the other side, any one creditor may keep a party in prison after a tender or actual payment of his debt and costs; but such is not the law. In *Houndsfield v. Drury* (c) the question was, whether the plaintiff had reasonable and probable cause to refuse to discharge the defendant; and it has no application to this case. *Crozer v. Pilling* (b) is directly in point, for it shews that a plaintiff is bound to accept from a defendant in custody the debt and costs when tendered, and to authorise the sheriff to discharge him. That case is stronger than the present, for there the prisoner had actually petitioned to be discharged, but had been remanded by the Insolvent Court. The 1 & 2 *Vict.* contemplates that a prisoner may be discharged out of custody by other means than the act of the Court, and payment of the debt is surely the best means of becoming entitled to such discharge. The vesting order is not the result of any act of the prisoner's, but it is done *in invitum*; and by the 37th section, the order may be discharged by the Court, with the consent of the petitioning creditor; it not being necessary to consult any other creditor, which shews that the object of the whole proceeding was to enable the creditor, who applied for the order, to obtain payment of his debt. The creditor would not in fact have been pre-

(a) 3 P. & D. 570; S. C. 11 A. R. 129.  
& E. 859.

(b) 4 B. & C. 26; S. C. 6 D. & E. 98.

(c) 3 P. & D. 127; S. C. 11 A.

iced if he had been compelled to refund the money to assignee, for upon his own shewing he was only entitled to come in *pari passu* with the other creditors. With regard to the question out of whose money the tender was made, enough appears to shew that it did not come out of the debtor's estate.

This being the last day of term, the Court said that judgment should be given at chambers.

*Cur. adv. vult.*

The reporters have been favoured with a copy of the judgment, which was delivered at chambers (Dec. 5) by COLERIDGE J.—This was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, he being detained under a *ca. sa.* for debt and costs. The ground for claiming his discharge was the order of these to the plaintiff, which had been refused under the following circumstances; and whether these justified the refusal was the question. The plaintiff, under the 36th section of the 1 & 2 Vict. c. 110, had petitioned the Insolvent Debtors' Court and procured a vesting order; the tender was made after this by the defendant's wife, and before the defendant had filed any schedule as required by that Court. The reason assigned by the plaintiff for refusing to accept the money was, that it formed part of the defendant's estate, and was therefore vested by the order in the provisional assignee; that he should therefore not be safe in accepting it, but should be obliged to refund it to the assignee; that it was therefore no satisfaction of the debt and costs, and consequently cast upon him no obligation to give the defendant his discharge. This reason, having been assigned at the time the refusal was given, drew the attention of the defendant to the question, whose money it was that was tendered to the plaintiff, and the manner, in which it is now sworn in the affidavits for the rule that the money was obtained, shews also that the attention of the defendant and his friends was at the very time alive to the

1840.



DRURY

v.

HOUNSFIELD.



1840.

DRURY  
v.

HOUNDSFIELD.

importance of this fact. Bearing this in mind, we observe that neither the defendant, nor any one on his part, distinctly denies the money to have been the proceeds of his personal estate, and we feel satisfied, as well from this as from what is stated in the affidavits, that the money must be taken to have been furnished from the defendant's estate.

But assuming this to be so, two points were made for the defendant. First, the case of *Crozer v. Pilling* (a) was relied on as being exactly in point, because, under the circumstances there stated, the money tendered by the plaintiff, if it had formed part of his estate, would, by the Insolvent Act then in force, equally have passed to the assignee, and the defendant therefore would have had as good cause for refusing to discharge the plaintiff, as the present plaintiff has for his refusal to discharge the present defendant. We cannot however attach much weight to this. That was an application for a new trial refused on the hearing, and the point now raised was not mentioned either at the bar or by the Court; besides which, the defendant there had refused the discharge on another and totally untenable ground, insisting, namely, that, beyond the debt and costs in the action, he would be paid some costs incurred in opposing the plaintiff in the Insolvent Debtors' Court.

Secondly, it was said that the plaintiff could not be prejudiced, even if the money were recovered back from him, because upon his own shewing he was now only entitled to come in *pari passu* with the other creditors, and therefore it would be but just that the sum so tendered should find its way into the hands of the provisional assignee.

And this is true; but it does not touch the question, which is, whether the plaintiff was bound to sign the discharge, and if not, whether the Court should now direct it. The plaintiff was not bound to discharge the defendant, because the exigency of the writ was not complied with by the tender. If the money tendered was clearly money


(a) 4 B. & C. 26; S. C. 6 D. & R. 129.

hich the plaintiff could not retain, the receipt of it was no satisfaction of the debt and costs, and it is satisfaction only, actual or legal, that entitles the defendant to a discharge. Nor ought the Court to order a discharge; because we cannot but see that that would assist the defendant in evading the order of the Insolvent Debtors' Court, to file a schedule, and so put his estate in a course of distribution among his creditors.

This rule therefore must be discharged, and, as it was moved with costs, discharged with costs.

*A.*

Rule discharged.

1840.  
  
 DRURY  
 v.  
 HOUNSFIELD.

The QUEEN v. ROBINSON.

Wednesday,  
 Nov. 11th.

INDICTMENT for assaulting, &c. one *Blythman*, on the 17th November, 1838, constable of the parish of Warsop, in the county of Nottingham, in the discharge of his duty. Second count, for a common assault.

Plea (to the first count), that on the 29th November, 1838, at the town and parish of Mansfield, in the said county, before *A.B.* Esquire, and *C.D.* Esquire, two of her Majesty's justices of the peace in and for the said county, the defendant was brought before the said justices charged, on a certain information, upon the oath of the said *Blythman*, with having, on the said 17th November, 1838, assaulted, &c. the said *Blythman* at Warsop aforesaid, and that the said justices, upon hearing the said complaint, deemed the offence not to be proved, and thereupon dismissed the said complaint, and the said *A. B.* and *C. D.* forthwith made out a certificate under their hands, stating the fact of such dismissal, and delivered such certificate to the defendant, as by the certificate of the said *A. B.* and *C. D.* under

Where two justices, on the 29th Nov. dismissed a charge of assault on the ground that the offence was "not proved," and did not give their certificate of such dismissal under 9 *Geo. 4*, c. 31, until the 10th Jan. following:—  
*Held*, that the certificate had not been granted "forthwith," within the meaning of sect. 27, and was therefore no bar to an indictment for the same assault.

2. Where a plea to an indictment for an assault alleged that the defendant had been brought before two justices for the same assault, and that the justices, deeming the offence not to be proved, "*forthwith*" gave the defendant a certificate of such dismissal, and the replication traversed the giving of the certificate *modo et forma*:—*Held*, (dubitate *Coleridge J.*) that the *time* of giving the certificate (*inter alia*) was in issue.

1840.

The QUEEN  
v.  
ROBINSON.

their hands, and now shewn to the Court here, more fully and at large appears, which doom. judgment and dismissal still remain in full force and effect. Averment of the identity of the defendant with the person so charged and dismissed as aforesaid, and of the identity of the assault, the subject-matter of the indictment, with the assault in respect of which the defendant had been so charged and dismissed before the said justices. Verification, and prayer of judgment.

2. To the second count, not guilty. Conclusion to the country.

Replication: 1. Precludi non, as to the first count, because the defendant *did not obtain such certificate in manner and form, &c.* Conclusion to the country. (Issue thereon.)

2. To the second plea, similiter.

The indictment, which had been removed into this Court from the Nottinghamshire Quarter Sessions, was tried at the summer assizes for the above county in 1839, when the jury returned a special verdict.

The special verdict found, as to the second issue, that the defendant was not guilty, and, as to the first issue, that the defendant had been brought before the said justices *on the 29th November, 1838*, and then charged with the same assault, which was the subject of the indictment as in the first plea alleged, "and that the said justices, upon hearing of the said complaint of the said *Blythman*, deemed the offence not to be proved, and thereupon, that is to say, on the *29th of November*, dismissed the said complaint as in the said plea alleged. And the said justices *afterwards*, that is to say, on the *10th of January, 1839*, made out a certificate under their hands, stating the fact of such dismissal, according to the provision of the statute in such case made and provided, and delivered such certificate to the said *Robinson* on the day and year last aforesaid, as alleged in the said plea, but such certificate was not delivered to the said *Robinson* before the day and year last aforesaid, and

which said doom, judgment and dismissal still remains in full force and effect," &c.

1840.

The QUEEN  
v.  
ROBINSON.

*Whitehurst*, for the defendant. The question is, whether the defendant was liable to be indicted for this assault after obtaining the certificate of the justices, under 9 *Geo.* 4, c. 31, s. 27 (a), that they had inquired into the same matter, and dismissed the complaint.

Independently of the certificate, it appears that the case had already been determined by the justices, and the defendant, having once been acquitted, could not be put in jeopardy a second time for the same offence. [*Coleridge J.* The justices did not find that the defendant was not guilty, but merely that the offence was "not proved." The defence is altogether the creature of the act. Would their determination be evidence to support a plea of *autrefois acquit*?] The certificate is not itself the defence to the indictment, but is provided as the convenient evidence of that defence, and is, in this respect, like the certificate of previous conviction for felony under 7 & 8 *Geo.* 4, c. 28, s. 11. Suppose

(a) Sect. 27 enacts, that "Where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs (if ordered) the sum of 5*l.*, which fine shall be paid to some one of the overseers of the poor, &c.; but if the justices shall deem the assault or battery *not to be proved*, or shall find the assault or battery to be justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith

make out a *certificate* under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

The 28th sect. enacts, "If any person, against whom any such complaint shall have been preferred, for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

1840.

The QUEEN  
v.  
ROBINSON.

the grand jury had the indictment brought before them immediately after the case had been disposed of by the justices and before the certificate could have been prepared, would the defendant have been without defence?

2. Assuming the certificate to be necessary, the prosecutor will object that it is ineffectual, because it was not given "forthwith" after the dismissal of the complaint before the justices. But the certificate, like a conviction by justices, may be drawn up at any time when occasion calls for it, and has relation to the time when the complaint was dismissed. The word "forthwith" in the statute is merely directory, or, perhaps, was intended to signify that the justices must furnish it immediately after it is *applied* for by the party. Suppose the justices had refused to grant the certificate, and this Court, after a long interval, had compelled them to do so by mandamus,—would the certificate be inoperative? In truth, the word "forthwith" has no more definite meaning than the word "instantly" was lately held to possess in *Reg. v. Brownlow* (a).

*W'illmore*, contra. The dismissal of the complaint, without the certificate, would be no defence. There is no analogy between the certificate in question and the certificate of a previous conviction under 7 & 8 *Geo.* 4, c. 28: the latter certificate is specially made evidence of all the facts contained in it; whereas this certificate would not dispense with any proof whatever.

The certificate should have been given immediately on dismissal of the complaint. The object of the statute was that the matter should be ended altogether by the same justices who heard the complaint, at the time when the case is fresh in their recollection. [Lord *Denman* C. J. Is the giving of the certificate "forthwith" properly put in issue by a traverse that it was given in manner and form, &c.?] The defendant alleges he obtained a proper certificate: the prosecutor denies this, and the whole matter is in issue.

(a) 3 P. & D. 52.

*Whitehurst*, in reply, contended that the giving of the certificate "forthwith" should have been traversed specially.

1840.  
  
 The QUEEN  
 v.  
 ROBINSON.

Lord DENMAN C. J.—When first I read the pleadings I thought that the time of giving the certificate was in issue, as well as the other matters material to the defence under the statute, and I think still that the whole question is sufficiently raised by the pleadings. It appears to me important that the certificate should be given without delay; it would be most inconvenient that the subject should be brought before the justices at a subsequent time, when they might be engaged with other business or not be sitting together. When the certificate is granted some weeks after dismissal of the complaint, it is not given "forthwith," in any reasonable sense of that term. It was ingeniously urged by *Mr. Whitehurst* that, on general principles, with reference to the certificate, the complaint, having once been dismissed, could not be brought before another tribu-

If the statute had said the certificate was to be given when the justices should think the party "not guilty" of the offence, there might be something in the argument. But the words are, if they "shall deem the offence *not to be proved*;" and I do not think, where the justices say an offence is not proved, they adjudicate so as to bar a proceeding before another tribunal: on the contrary, the phrase itself seems to indicate that further inquiry is desirable.

WILLIAMS J. (a)—The word "forthwith" should have a reasonable construction. If we are to take it that the same justices who dismiss the complaint are to give the certificate, they should certify within some reasonable time after hearing, while the case is fresh in their recollection.

As to the pleadings, I think the word "forthwith" in the plea limits the time, so as to make it material, and that time is put in issue by the replication.

(a) *Littledale J.* was absent.

1840.

~ ~ ~  
The QUEEN  
v.  
ROBINSON.

COLERIDGE J.—I agree as to the certificate under the statute being the defence to the indictment, and as to the time when it is to be given. Where the justices, under this statute, dismiss the complaint, because they think either that the assault is justified or that it is not proved,—how can that be said to be the same as a finding of “not guilty,” so as to entitle the party charged to the defence of *autre fois acquit*? I thought at first “forthwith” might mean merely that the certificate should be given, *when applied for*, without delay. But I now think such a construction would do violence to the statute, and that the certificate must be given at the same time when the complaint is dismissed, or substantially so, or at least so soon after, that all the circumstances of the case may be fresh in the recollection of the justices.

I have, however, some little doubt whether the time of giving the certificate is properly in issue.

Judgment for the crown.

Monday,  
Nov. 16th.

TUSON v. EVANS, Clerk.

In an action for libel, it appeared that the plaintiff was churchwarden and the defendant clergyman of the same parish, and that, differences having arisen

between them in that relation, the plaintiff requested that the defendant's future communications should be by letter to the plaintiff's clerk. The defendant afterwards applied, by letter to the clerk, for money which he conceived to be due to himself from the plaintiff. The clerk answered that the plaintiff denied his liability, and in reply the defendant addressed a letter to the clerk, saying, “This attempt to defraud me is as mean as dishonest.”

*Held*, that it was properly left to the jury whether the above language was justified by the occasion, and that the communication was not in itself privileged so as to render proof of actual malice necessary to sustain the action.

warden and clergyman differences had arisen between them, and the plaintiff had requested that the defendant's communications should be by letter to his clerk. The defendant having to make a payment to the plaintiff, had inclosed the money in a letter to the plaintiff's clerk, in which he demanded a receipt to be returned, and also the payment of some rent which he conceived and claimed to be due from the plaintiff to himself. The clerk returned a receipt, and informed the defendant that the plaintiff denied his liability to the plaintiff for any rent. The reply to this letter was addressed to the plaintiff's clerk, and contained the alleged libellous matter; after acknowledging the receipt sent, the defendant commented on the refusal to pay the rent, and added, "this attempt to defraud me of the rent is as mean as dishonest."

The jury, under the direction of the learned judge that this language was not justified by the occasion, returned a verdict for the plaintiff with nominal damages.

*Bompas* Serjt., on a former day in this term (a), in pursuance of leave reserved at the trial, moved to enter a non-suit. The letter in question was written to a person authorised, on the part of the plaintiff, to treat with the defendant concerning that which was the subject-matter of the letter. The letter therefore may be considered to have been written to the plaintiff himself. The occasion on which it was written was a lawful occasion, and would justify the letter as a privileged communication in the absence of express malice. The common business of life could not be conducted unless a party, who is devoid of all malicious intent, is allowed to express himself freely in the fair prosecution of his own interest. The question should have been left to the jury whether the occasion was such as would justify the communication, unless it resulted from actual malice. A person applied to for the character

(a) November 6, before Lord *Denman* C.J., *Littledale*, *Williams* and *Coleridge* Js.



1840.

TUSON  
v.  
EVANS.

of a servant may, if he acts *bonâ fide*, assert the servant to be a thief. [*Littledale J.* However lawful the occasion, it does not appear that there was the slightest ground for imputing fraud to the plaintiff.]

LORD DENMAN C. J.—We will see my brother *Maule*.

*Cur. adv. vult.*

LORD DENMAN now delivered the judgment of the Court, and, after stating the facts as above, proceeded thus:—Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so prejudiced his case upon any future claim, and the defendant would therefore have been privileged in denying the truth of the plaintiff's statement; but, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one in the transaction of business with another has a right to use language *bonâ fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another, and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest in the present case to deny the truth of the plaintiff's assertion; to characterise that assertion as an attempt to defraud, and "as mean and dishonest" was wholly unnecessary.

This case therefore was properly left to the jury, and there will be no rule.

Rule refused.



1840.

## BEECH v. WHITE.

Wednesday,  
November 11.

**ASSUMPSIT.** The declaration stated that by agreement in writing, dated the 10th October, 1831, the plaintiff agreed to let, and the defendant agreed to take, a farm and messuage called &c., situated &c., from the 10th October, 1831, at the yearly rent of 260*l.* as a yearly tenant, with a half year's notice to quit; the plaintiff on her part undertaking to repair the premises within twelve months, after which period the defendant was to keep them in repair, and further to use the farm after the most approved manner of husbandry. Averment: that the plaintiff, confiding &c. did repair within the said twelvemonths, and demise to the defendant upon the terms aforesaid. That defendant became tenant of the premises and occupied by virtue of his tenancy, until the 10th October, 1839. Breach: that defendant did not during the continuance of the tenancy keep the premises in repair, but on the contrary &c., to wit, on &c., and from thence until the 10th October, 1839, wrongfully permitted the premises to be ruinous and prostrate &c. for want of needful repairing, and afterwards, to wit, on the day and year last aforesaid, wrongfully yielded up the premises so ruinous, prostrate &c.

**Pleas:** 1. Non assumpsit.

2. That the defendant did not become tenant of the premises nor occupy the same upon the terms in the declaration alleged.

At the trial before *Coleridge J.* at the Hampshire summer assizes, 1840, it appeared that the agreement between the parties contained (inter alia) the following terms:—"Memorandum of agreement &c. *Sarah Beech* agrees to let, and *Francis White* agrees to take, the farm called &c., situate &c., and the great tithes thereof, from the 10th October, 1831, at the yearly rent of 260*l.* payable &c.: *F. White* to take the farm as a yearly tenant, with half a year's notice to

In assumpsit against a tenant for not repairing, the declaration stated an agreement on the part of the plaintiff to let on a certain day, and to put the premises in repair within twelvemonths, and on the part of the defendant to keep them in repair subsequently. Averment: that the plaintiff did repair within twelve months and did demise, and that the defendant occupied but did not keep in repair.

**Pleas:** 1. Non assumpsit.  
2. That defendant did not become tenant on the terms stated. It appeared that the agreement, in addition to the terms stated in the declaration stated also that the plaintiff was to keep the premises insured and to rebuild in case of fire.

*Held*, that the variance between the

declaration and the agreement was ground of nonsuit.

1840.

BEZCH  
v.  
WHITE.

quit. *F. White* agrees to pay all rates, taxes, and assessments, to king, church, and poor, including the land tax. *S. Beech* is to keep the buildings in the said premises insured in the sum of 600*l.* and *F. White* is to pay to *S. Beech* whatever sum she may pay for premium or duty on such insurance, half-yearly, at the time appointed for payment of the rent as above mentioned; and *S. Beech* is to rebuild in case of fire. *S. Beech* is to repair the premises within twelve months, after which *F. White* is to keep them in repair," &c. &c. The plaintiff was nonsuited on the ground of variance, inasmuch as the declaration contained no statement of the plaintiff's undertaking to insure and rebuild, and of other matters contained in the memorandum.

*Erle*, on the first day of this term, moved for a rule to set aside the nonsuit and for a new trial. The stipulation in the agreement that the plaintiff should insure, and rebuild in case of fire, did not qualify the defendant's promise, and therefore was not a necessary part of the declaration. The above stipulation by the plaintiff, and the stipulation by the defendant, on the other hand, to repair, were independent stipulations, and the plaintiff's insuring was not a condition precedent to his right of action for the non-repair; it was not, therefore, necessary that the declaration should state any thing with respect to the insurance: *Campbell v. Jones*(a), *Boone v. Eyre* (b), *Dawson v. Dyer* (c).

The defendant was bound to repair by implication of law, independently of his written promise. [*Coleridge* J. I thought the defendant became tenant on the terms of having the demise of tithes, and the premises put in repair and insured.] The omission by the plaintiff to insure would not exempt defendant from his liability to repair, unless damage accrued from such omission. It is sufficient that the declaration states that part of the agreement which applies to the breach complained of, if that which is omitted

(a) 6 T. R. 571.

(b) 2 W. Bl. 1312.

(c) 5 B. &amp; Ad. 584, S. C. 2 N. &amp; M. 559.

does not qualify that which is stated: *Tempest v. Rawling*(a), *Holley v. Streeton*(b). Suppose the agreement by the plaintiff had been to let a farm and tithes, and to lend the defendant 1000*l.* how could the defendant say he did not take on the terms of repairing, because the plaintiff had not performed his promise as to the demise of tithes &c., and as to the loan. [Coleridge J. I do not see why you might as well have omitted the plaintiff's undertaking to put in pair just as well as his undertaking to insure.]

1840.  
BEECH  
v.  
WHITE.

*Cur. adv. vult.*

LORD DENMAN C. J. now stated the opinion of the court (c) to be that the nonsuit was right, as the plea of non-assumpsit had put in issue the whole consideration of the promise as well as the promise itself; and that the third plea, denying that the defendant held on the terms alleged in the declaration, was also proved.

Rule refused.

(a) 13 East, 18.

(b) 2 B. & C. 273; S. C. 3 D. & 522.

(c) Lord Denman C.J., *Littlehale*, Williams and Coleridge Js.

### BOORMAN and others v. BROWN (a).


**CASE.** The declaration stated, that before and at the time of the committing of the grievance &c. the plaintiffs

(a) Decided Trinity Term, 1841 (May 29).

A declaration in case stated that the plaintiff employed the defendant as a broker to sell certain goods, and to deliver the same according to the terms of the contracts of sale to such persons as should become the purchasers thereof. That the defendant as such broker made a contract between the plaintiff and a purchaser for the sale of such goods, to be paid for on delivery to the purchaser, less 2½ per cent. That in pursuance of the contract the plaintiff consigned the said goods to the defendant to be delivered by him to the said purchaser, upon the price being paid on delivery, less 2½ per cent. That thereupon it became defendant's duty as such broker to take care that the goods should not be delivered to the purchaser or any other person without being paid for. Yet the defendant contriving &c., did not use reasonable care in that behalf, in consequence of which the goods were delivered to other persons than the purchaser without payment, by reason whereof, the purchaser having become bankrupt, the plaintiff had lost the price of the goods.

**Held**, that the declaration alleged the duty of keeping the goods until payment to result from the defendant's character as broker, that no such duty did result from that character, and that the declaration was bad after verdict.

1840.

  
BOORMAN  
v.  
BROWN.

carried on the business of linseed crushers in Kent, and the defendant carried on the business of an oil broker in London. That before the time when &c., to wit, on the 1st January, 1836, the plaintiffs had retained and employed the defendant as such broker to sell at London, for the plaintiffs, certain quantities, to wit, 30 tuns of linseed oil, and to deliver the same in the port of London, according to the terms of the contract or contracts of sale, to such persons as should become the purchaser or purchasers thereof, for a certain reasonable commission and reward to the defendant in that behalf, which retainer and employment the defendant then accepted. That before the time when &c., to wit, on the 11th January, 1836, the defendant, *as such broker* as aforesaid, in pursuance of the said retainer and employment, and being duly authorised by the said plaintiffs, and one *J. G. Peacock*, in that behalf, made a certain contract between the plaintiffs and *J. G. P.*, whereby the plaintiffs sold to *J. G. P.*, and he purchased of the plaintiffs, the said 30 tuns of linseed oil, at the price of 42*l.* 10*s.* per tun and usual allowances, to be delivered in the river Thames, 10 tuns the last fourteen days in March then next, 10 tuns the last fourteen days in April then next, 10 tuns the last fourteen days of May then next, and the amount of each parcel to be paid for upon delivery in ready money, less 2½ per cent. discount, which contract the plaintiffs and *J. G. P.* then respectively accepted. That after the making of the said contract, the plaintiffs in pursuance thereof consigned to the defendant, at London, in the last fourteen days of March and April respectively, two several parcels of linseed oil of 10 tuns each, to be delivered by him to *J. G. P.*, *upon the price and amount thereof being paid by J. G. P. to him the defendant in ready money, less 2½ per cent. discount, and the defendant then delivered the same respectively to J. G. P. upon such payment thereof being so made.* That after making the contract, and in pursuance thereof, and of such retainer and employment, to wit, on the 26th May, 1836, the plaintiffs consigned to the defendant, as such broker as

1840.

BOORMAN  
v.  
BROWN.

aforesaid, at London, 10 other tuns of linseed oil, being the residue of the said 30 tuns comprised in the contract, to be delivered by the defendant to *J. G. P.* upon payment of the price thereof by *J. G. P.* to him the defendant; and the said last mentioned 10 tuns of linseed oil being so consigned, afterwards, to wit, on the 29th of May, in the year aforesaid, arrived in London aforesaid, on board of the said barge or vessel, of all which the defendant had notice, and then took upon himself the delivery of the said last mentioned 10 tuns of linseed oil, according to the terms of the said contract, and thereupon *it became and was the duty of the defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said 10 tuns of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to him (the defendant), according to the terms of the contract, yet the defendant not regarding his said duty, but contriving to defraud and injure the plaintiffs, did not nor would use reasonable care and diligence that the last mentioned 10 tuns of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to the defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises, that by and through the mere negligence and carelessness of the defendant, the last mentioned 10 tuns of linseed oil, after the arrival thereof at London aforesaid, to wit, on the 31st May, 1836, were delivered to certain persons carrying on trade under the firm of Messrs. John Hare & Co. at Bristol, without the price for the same, or any part thereof, being paid by the said J. G. P., or any other person, to the said defendant, by reason whereof the said J. G. P. having become a bankrupt, and being unable to pay for the said oil, the said plaintiffs have lost and been deprived of the said oil, and the price and value thereof.*

Pleas: 1. Not guilty.

2. That the plaintiffs did not consign to him, nor did the defendant take upon himself the delivery of the oil modo et

1840.

BOORMAN  
v.  
BROWN.

3. That the plaintiffs did not employ the defendant as such broker, as in the declaration mentioned, to sell the linseed oil in the declaration mentioned, and to deliver the same for commission or reward to him the defendant in that behalf, nor did the defendant accept such retainer and employment modo et formâ.

Issue was joined on the above pleas.

A verdict having been found for the plaintiffs, a rule nisi was obtained for arrest of judgment, on the ground that the form of action should have been assumpsit, and not case, and that, even supposing case would lie, no sufficient duty was laid in the declaration.

*Cresswell* and *Cleasby*, in Michaelmas term, 1840 (a), shewed cause. On the first point they contended that case was the proper form of action, but the judgment of the Court renders it unnecessary to report the argument on this point. They cited *Rogers v. Head* (b), *Burnett v. Lynch* (c), *Marzetti v. Williams* (d), *Coggs v. Bernard* (e), *Godefroy v. Jay* (f), *Govett v. Radnidge* (g), *Pozzi v. Shipton* (h), *Com. Dig. Action on the Case, Misfeasance*, (A 3), and the statutes 1 Jac. 1, c. 21, and 6 Ann. c. 16, relating to brokers. Upon the second point, it is expressly stated that by reason of the employment of the defendant as a broker by the plaintiff, "it became and was the duty of the defendant as such broker, to use all reasonable care and diligence" that the oil should not be delivered without payment, and this is sufficient.

Sir J. Campbell A.G., Kelly and Butt, in support of the

(a) Before Lord Denman C. J.,  
*Littledale, Williams and Coleridge*  
Js.

(b) Cro. Jac. 262.

(c) 5 B. & C. 589; S. C. 8 D.  
& R. 368.

(d) 1 B. & Ad. 415.

(e) 2 Ld. Ray. 909.

(f) 7 Bing. 413; S. C. 5 M. &  
Sc. 284.

(g) 3 East, 62.


(h) 8 Ad. & El. 963; S. C. 1 P.  
& D. 4.

rule upon the first point, relied upon *Orton v. Butler* (a) and *Corbett v. Puckington* (b), and distinguished the cases cited on the other side.

Secondly, as to the manner in which the duty is alleged. It does not appear that it is imposed by the contract; there is no misfeasance in this case, as in *Coggs v. Bernard* (c), *Pozzi v. Shipton* (d), *Govett v. Radnidge* (e), but the defendant is merely charged with nonfeasance. There is no allegation of misdelivery, and in the case of carriers trover cannot be sustained for non-delivery, though for misdelivery it may. The gravamen in this case is, that payment was not demanded by the defendant on the delivery of the goods, which is clearly a nonfeasance only. The defendant is charged as a broker, not as a factor, and in this case no custom, either general, as in the case of carriers and innkeepers, or local, as in *Marzetti v. Williams* (f), applies

*Cur. adv. vult.*

LORD DENMAN C. J., in Trinity term, 1841 (May 29), delivered the judgment of the Court, and after stating the substance of the pleadings, proceeded thus:—The argument brought under our review the whole doctrine relating to the different forms of action in tort and in contract. But it is unnecessary for us to consider how that doctrine ought to be applied generally, because we find this declaration defective in an essential point, even supposing that an action on the case may be a proper remedy under such circumstances as are disclosed. For it must be founded on the violation of some duty, but here the duty described is that of keeping the goods consigned till they were paid for, and it is asserted as resulting solely from the defendant's character as broker. Now the character of a broker is well known to the law,

1840.  
  
 BOORMAN  
 v.  
 BROWN.

(a) 5 B. & Ald. 652; S. C. 1 D. & R. 282.

(b) 6 B. & C. 268; S. C. 9 D. & R. 258.

(c) 2 Ld. Raym. 909.

(d) 8 Ad. & El. 963; S. C. 1 P. & D. 4.

(e) 3 East, 62.

(f) 1 B. & Ad. 415.



1840.

BOORMAN  
v.  
BROWN.

his duties are defined by statutes and by common law, and certainly embrace none to the effect here assumed. Therefore no breach of duty is alleged, and no ground of complaint appears on the record.

The rule for arresting the judgment must of course be made absolute.

A. Rule absolute to arrest the judgment.

The QUEEN v. The Justices of WILTSHIRE (a).

1. Where a person charged at the petty sessions, as a putative father, appears there, and, under 2 & 3 Vict. c. 85, desires that the case should be heard at the quarter sessions, and enters into his recognisance to answer the charge at the latter sessions, to be held on a stated day, and to abide the judgment of that court and to pay all costs, it is not necessary at the hearing to prove that he has had notice for the hearing at the quarter sessions, or that he had notice originally for the petty sessions.

*SLADE*, in Trinity term last, obtained a rule to shew cause why a certiorari should not issue to remove into this Court an order made by the defendants at the Quarter Sessions on the 7th of April last, whereby one *John Dyke* was adjudged to be the putative father of a bastard child, and was ordered to pay certain expenses of maintenance and costs.

The order, after stating that the parish of Trowbridge in the county of Wilts was situate within the union of Melksham, and that part of such union was situate within the division of Trowbridge in the said county, recited that it had been certified to the Court of Quarter Sessions that the *guardians* of the poor of the union of Melksham had applied to the petty sessions held on the 17th of March last, for the division of Trowbridge, for an order upon the said *John Dyke*, as the putative father, to reimburse the parish of Trowbridge for the maintenance of a bastard which had become chargeable to that parish, and that the said *J. Dyke*

(a) Decided at the sittings after term (Nov. 26).

2. Where the quarter sessions make an order adjudging a party to be the putative father, they cannot thereby award costs against him; but, if so much of the order as relates to costs can be separated, it is good for the remainder.

3. Where a bastard becomes chargeable to a parish forming part of a union, although it is not a union for the purpose of rating under 4 & 5 Will. 4, c. 76, s. 34, either the overseers of the parish may apply for an order upon the putative father for its maintenance, or (dubitate *Coleridge J.*) the guardians of the union.

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

having had *due notice* to appear at the said petty sessions, as there personally present thereat in pursuance of such notice, and having heard the said information, application, and charge of the said guardians, did declare to the said justices at the said petty sessions that he was desirous that the said charge should be heard and determined at the quarter sessions of the peace, and to enter into the recognizance required by the statute in that case made and provided; and the said *J. Dyke* did, at such petty sessions, enter into a recognizance in the sum of 40*l.* with *A.* of &c. and *B.* of &c. as his sureties in the sum of 20*l.* conditioned that the said *J. Dyke* should personally appear at the present quarter sessions of the peace of the said county, then and there to answer the said charge, and abide the judgment of this court, and pay all the *costs* incurred by the said guardians in bringing such charge before this court, in case the said court should adjudge him to be the putative father of the said bastard child; whereupon the said justices in such petty sessions assembled did not proceed further to hear the said charge, but having taken such recognizance, transmitted the same to the clerk of the peace."

The order then adjudged *Dyke* to be the father of the child, and ordered him to pay "unto the guardians of the said union the sum of 1*l.*s. expended by the said union for the maintenance and support of the said child from &c. to the present time," and a weekly sum for its future maintenance, and concluded thus—"and this court having ascertained that the *costs* incurred by the said guardians in bringing the said charge before the court amount to the sum of 0*l.* 1*l.*s. 10*d.* doth therefore order and adjudge that the said *J. Dyke* shall and do forthwith, on sight of this order, pay the said sum of 50*l.* 1*l.*s. 10*d.* to the said guardians of the said union of Melksham."

The affidavits on which the rule was obtained stated that *Dyke* appeared at the petty sessions, and then entered into his recognisance as in the above order mentioned, and that neither at the petty nor at the quarter sessions was proof

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

given of the intended application by the guardians, although at the quarter sessions such proof was called for by *Dyke's* counsel.

That the union of Melksham was not one parish for the purpose of rating under 4 & 5 *Will.* 4, c. 76, s. 34, but that each parish in the union contributed to the common fund of the union proportionally to its expenses. At the time of forming the union the number of guardians in the union was twenty, besides six magistrates, who were *ex officio* guardians.

From the affidavits in opposition to the rule it appeared that the notice served upon *Dyke*, of the intended application to the petty sessions, was signed by six guardians only, but that six was the entire number of guardians present at the meeting at which the notice was signed. That *Dyke* was duly served with a seven days' notice at the petty sessions, and attended there at the time notified, and that at such sessions neither he nor any one in his behalf required proof of such notice.

Sir W. W. *Follett* and *Hodges* in support of the order of sessions. Several objections, it is understood, will be made to this order. 1. That it was not proved at the quarter sessions that *Dyke* had notice to appear at the petty sessions. But it is stated in the affidavits that he had, in fact, such notice, and the order states that he had "due notice;" and all objection on this head is waived, for he did appear at the petty sessions and enter into his recognisance to appear at the quarter sessions.

2. It will be objected that the order is bad, because notice was actually not given to appear at the quarter sessions, and also because the order does not recite that such notice was given. By the 4 & 5 *Will.* 4, c. 76, s. 72 (a), the

(a) Section 72 enacts, "That when any child shall be born a bastard, and shall by reason of the inability of the mother &c. become

chargeable to any parish, the *overseers or guardians* of such parish, or the guardians of any union in which such parish may be situate,

quarter sessions were empowered to make an order of maintenance on a putative father, and by the following section,

may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace, within the jurisdiction of which such parish or union shall be situate, after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance, and the court to which such application shall be made shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as to such court shall appear to be just and reasonable under all the circumstances of the case, &c."

Sect. 73 enacts, "That no such application shall be heard unless fourteen days' notice shall have been given under the hands of such *overseers or guardians* to the person intended to be charged with being the father of such child of such intended application; and in case there shall not previously to such sessions have been sufficient time to give such notice, the hearing of such application shall be deferred to the next ensuing quarter sessions, &c. &c. Provided that if upon the hearing of such application the court shall not think fit to make any order thereon, it shall order that the full costs and charges incurred by the person so intended to be charged in

resisting such application shall be paid by such overseers and guardians."

The 2 & 3 Vict. c. 85, s. 1, enacts, "That when any child which has been born a bastard since the passing of 4 & 5 W. 4, c. 76, and with respect to which no application shall have been made to any court of general quarter sessions &c. shall &c. become chargeable to any parish, *the guardians* of any parish, or of the union in which any parish may be situate, *or if there shall be no such guardians, then the overseers* of such parish may, if they think proper, at any time within three calendar months after such child shall have become chargeable, apply to the justices of the peace holding any special or petty sessions in and for the division or borough within which such union or parish, &c. shall be situated, for an order upon the person whom they shall charge &c. to reimburse such union or parish for its maintenance and support; and the justices then and there assembled, not being less than two, shall proceed with respect to the application, and shall have all the powers and duties, in regard thereunto, which are given to the quarter sessions by 4 & 5 Will. 4, c. 76, *and all enactments* in the said act relating to the court of general quarter sessions shall be taken to apply to the said justices in special or petty sessions, *except that the notice* to the person intended to be charged &c. need not be given more than seven days instead of fourteen days before the

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

no application for such an order was to be heard without fourteen days' previous notice to him. The 2 & 3 Vict. c. 85, transfers this jurisdiction to the petty sessions, in the first instance, and substitutes a seven days' notice, and it is only if the putative father declares at petty sessions his wish that the case should be heard at the quarter sessions, and enters into a recognisance personally to appear there, that the quarter sessions have jurisdiction. By the present law, therefore, an order cannot be made on a putative father by the quarter sessions, except under circumstances where a notice to him to appear at those sessions would be useless, for he must previously have entered into his recognisance to appear there, and have previously had notice of and appeared to the same charge at the petty sessions. The answer, therefore, to this objection is, that notice was unnecessary, for *Dyke* was the party who removed the case to the quarter sessions, and also that he there appeared.

3. It will be objected that the application to the petty sessions should have been made by the overseers of the parish of Trowbridge, and not by the guardians of the union of Melksham. But under the 4 & 5 Will. 4. c. 76,

session at which the application shall be heard; and after the passing of this act it shall not be lawful to make any such application to any court of quarter sessions, nor shall any court of general quarter sessions have any authority to make any order upon any such application."

Section 3. "Provided always, that if the person whom the guardians or overseers shall charge &c. shall declare to the justices in such special or petty sessions that he is desirous that the charge shall be heard and determined at the quarter sessions of the peace, and shall enter into a recognisance, with two sufficient sureties, conditioned personally to appear at the quarter

sessions the next or next but one ensuing, as the justices shall think fit, to answer to the said charge, and to abide the judgment of the court at such sessions, and to pay all the costs incurred by the said guardians or overseers in bringing such charge before the said court, in case the court should adjudge him to be the putative father, &c. then the justices in special or petty session shall not proceed further to hear the charge, but shall take such recognisance and transmit it to the clerk of the peace; and in such case all further proceedings in the matter shall be had before the quarter sessions as if this act had not been made."

s. 72, the application may be made either by overseers or guardians, and *Reg. v. James* (a) has merely decided that the overseers of a parish, forming part of a union, may make the application, not that the guardians of the union may not; and the 2 & 3 Vict. c. 85, s. 1, is conclusive against the objection, for it is only where there are no guardians that overseers can now make the application. It appears too that the guardians in this case had an interest in the matter, inasmuch as they had already incurred some expenses of maintenance.

4. If it is objected that the quarter sessions had no power to make an order on *Dyke* for costs, the answer is, that by the 72d section of the former act the quarter sessions may make such order upon the putative father as shall appear to that court just and reasonable under all the circumstances of the case, and that the recognisance entered into by him was, according to the requirements of the latter statute, expressly conditioned for the payment of such costs, in case he should be adjudged the putative father. At all events, if the objection is valid, the order may be quashed, so far only as relates to the costs and stand good for the residue: *Rex v. Sweet* (b), *Rex v. Maulden* (c), and *Rex v. St. Nicholas, Leicester* (d).

*Slade* contra. 1. Notice should have been proved at the petty sessions, and the order should have stated the proof of such notice. All the facts which led to the quarter sessions having jurisdiction over the case should have been stated. It has lately been decided by *Patteson J.* in *Reg. v. The Justices of Hants* (e) that such an order should set out the preliminary proceedings at petty sessions. The statement in the order of "due notice" is insufficient from its generality: *Rex v. Croke* (f).

(a) 1 P. & D. 422.

(b) 9 East, 25.

(c) 8 B. & C. 78; S. C. 2 M. & R. 146.

(d) 3 A. & E. 79; S. C. 4 N. & M. 624.

(e) 9 Dowl. P. C. 171.

(f) Cowp. 26.

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

2. On the removal of this case from the petty sessions to the quarter sessions the whole proceeding was to be regulated by 4 & 5 *Will.* 4, c. 76, s. 73, and a fourteen days' notice became necessary, and should have been stated in the order. The third section of the 2 & 3 *Vict.* c. 85, which transfers the jurisdiction to the petty sessions, enacts, that where the party charged removes the case to the quarter sessions, "all further proceedings in the matter shall be had before the quarter sessions, as if this act had not been made." His recognisance therefore did not dispense with his right to notice.

3. The application should have been made by the overseers of the parish of Trowbridge. As this was not a union for the purpose of rating, the individual parish to which the child was chargeable had alone any interest in the matter. *Reg. v. James(a)* shews that the overseers may apply in such a case; and it would be inconvenient and impracticable that it should be optional to either the one set of officers or the other to apply, for, if either might apply, both might. But, even if the guardians might apply, the notice of the intended application should have been signed by all of them or by a majority.

4. The statutes have given the sessions no power to order costs, and the recognisance will not supply it. Such a power is always given by express words, as in 4 & 5 *Will.* 4, c. 76, s. 73; 17 *Geo.* 2, c. 38, s. 4; 49 *Geo.* 3, c. 68, s. 5, and 6 & 7 *Will.* 4, c. 96, s. 6. Costs can only be recovered in this case through the medium of the recognisance.

LORD DENMAN C. J.—Several objections are made to this order. It is said that, as the 3rd sect. of the statute of *Victoria* enables the putative father to remove his case from the petty to the quarter sessions, and enacts that "in such case all further proceedings shall be had before the quarter sessions as if this act had not passed," therefore the old

(a) 1 P. & D. 422.

notice of fourteen days must be given to him under the Poor Law Amendment Act. I do not think such notice was necessary. The party charged appeared at the petty sessions, and himself removed the case; and it is clear that by the statute of *Victoria* the justices at petty sessions had power to appoint the hearing at the next quarter sessions.

Then it is said the application should have been made by the overseers. But clear power is given to the guardians to make the application. In *Reg. v. James (a)* we decided that the overseers had the power, and we now only decide that the guardians have it.

It was also objected that it should have been proved at the quarter sessions, and stated in the order, that the party had seven days' notice of the application to the petty sessions. But I think the acts of the party himself get rid of this objection.

Lastly, as to the costs. The act does not authorise the sessions to order costs, and so far the order is bad; but it may be divided, and we hold it good for the residue.

LITTLEDALE J.—I am of the same opinion. I think, by the express language of the statutes, the guardians had a right to make the application; and it appears that in this case they had, to a certain extent, a special interest in it.

Another objection to the order is, that it does not properly state that notice to *Dyke* to appear was proved at the petty sessions. But he appeared at those sessions, and waived notice, and entered into his recognisance to appear at the quarter sessions; which gets rid of the other objection also with respect to want of notice for the quarter sessions.

I agree also in what has been said by my lord with respect to costs.

WILLIAMS J. concurred.

(a) 1 P. & D. 422.



1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

COLERIDGE J.—With regard to the want of notice at the petty sessions, I see nothing to take the case out of the general rule that a party, by appearing and not objecting on that ground, waives the want of notice. As therefore it was unnecessary to prove notice at those sessions, it cannot be necessary to set out such notice in the order.

With regard to the want of notice to the quarter sessions, I think *Rex v. Justices of Carnarvonshire* (a) rightly decided that the party in that case had a right to object for the want of notice. The 73rd sect. of the 4 & 5 Will. 4, c. 76, requires that the party charged should have fourteen days' notice before the *hearing*, and distinguishes, it would seem, between the application and the hearing. But here the party, without objecting, entered into his recognisance to abide the judgment of a specified session. He could not therefore want notice; he was bound to appear without notice, and it was unnecessary that the order should set out that notice had been given.

The objection to the want of notice failing altogether, the objection that the notice was not signed by a sufficient number of guardians falls to the ground of itself.

The objection, however, that the guardians were not the parties to make the application still remains; and the decision in *Reg. v. James* (b), that the parish officers might make the application, raises, I confess, some doubts in my mind whether the guardians of the union can also make the application, though my doubts are not strong enough to induce me to dissent from the other members of this Court. At the same time I do not deny that the guardians have some interest in the matter.

Upon the last question, whether the sessions, where they do make an order of maintenance, can order the party charged to pay costs, I will only add by way of confirmation of our judgment, that the 73d section does enable the sessions to order costs against the parties applying where the

(a) 5 N. &amp; M. 364.

(b) 1 P. &amp; D. 422.

order of maintenance is *not* made. The maxim therefore, *expressio unius &c.* applies.

Rule absolute to bring up the order to be quashed so far only as it related to the costs (*a*).

(*a*) See *Reg. v. Stoddart*, *post*, 1 Gale & D.

1840.

The QUEEN  
v.  
Justices of  
WILTSHIRE.

### The QUEEN v. DUNN.

Monday,  
November 9th.

THE defendant, a prisoner in Clerkenwell prison, was brought into this Court, on the second day of this term, by a writ of habeas corpus returnable on that day.

On the following day (November 4th) the defendant was again brought into court, and the return was read.

The return stated that the defendant was detained in custody under a warrant of committal, by a police magistrate of Hatton Garden, bearing date the 11th July, 1840, issued against the defendant, for having refused to comply with an order of the Middlesex General Quarter Sessions, on the 29th of the preceding June, whereby he was required to enter into his own recognisance in 500*l.* and to find two sureties in 250*l.* each, to appear at the next general quarter sessions for the said county after the expiration of two years, and in the meantime to keep the peace and be of good behaviour towards all her majesty's subjects, and particularly towards the said Miss *Coutts*, the exhibitant at such sessions of articles of the peace against the defendant.

The defendant had removed into this Court by certiorari the order of sessions, and the articles of the peace referred to in the said return, and certain depositions annexed to those articles.

3. The exhibitant must swear to threats, conveyed either by words or conduct, of personal violence; and it is not enough merely to state facts from which the Court may infer such threats.

4. Where articles of the peace were returned by certiorari, and affidavits made by others than the exhibitant were subjoined on the same parchment, and the whole ended with the following jurat;—"Sworn by the several deponents," &c.—*Held*, that it sufficiently appeared that the articles had been exhibited on oath.

1. This Court has power to review the decision of the Quarter Sessions in binding a party over on articles of the peace exhibited against him.

2. Where the return to a habeas corpus states that the prisoner has been committed for not finding sureties of the peace, according to an order of sessions on articles of the peace there exhibited, the order and the articles may be removed by certiorari, and, if the articles are insufficient, the prisoner will be discharged.

1840.

  
 The QUEEN  
 v.  
 DUNN.

The order of sessions was in the terms above recited. The articles of the peace and depositions were as follows:

At the quarter sessions of the peace of our Lady the Queen, holden at the Sessions House, Clerkenwell Green, in and for the county of Middlesex, on Monday the 29th day of June, in the fourth year of the reign of our Sovereign Lady the Queen of Great Britain and Ireland, before *A. B.* and *C. D.* esquires, and others their fellows, justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in and for the said county of Middlesex, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the same county.

Middlesex.—Articles of the peace exhibited by *Angela Georgiana Burdett Coutts*, of Stratton Street, Piccadilly, in the county of Middlesex, spinster, against *Richard Dunn*, late of the parish of Saint Marylebone in the said county, esquire, in order to preserve the life and person of this exhibitant from bodily harm.

First, this exhibitant on her oath saith, that in the month of August, 1838, this exhibitant received two letters signed *Richard Dunn*, but which letters, from the strange language contained in them, this exhibitant considered to have been written by some insane person, and consequently threw them aside, and she believes that they were destroyed with other waste papers. And this exhibitant further saith, that in the said month of August, 1838, *Richard Dunn*, against whom these articles are exhibited, but who until that time was totally unknown either by name or person to this exhibitant (except by the said two letters), came to the Queen's Hotel at Harrowgate, in the west riding of the county of York, and there obtained a room nearly opposite to the sleeping room occupied by this exhibitant, who was at that time residing in the said hotel, and by some means unknown to this exhibitant contrived to place or have placed his card in this exhibitant's said room. That this exhibitant, feeling greatly annoyed by this circumstance, on the following morning removed from the said hotel with her

establishment and went to reside at another part of the town, where letters written by the said *R. Dunn* and addressed to this exhibitant were continually thrown into the garden of the house where this exhibitant was then residing, and she was there otherwise annoyed by the said *R. Dunn* coming to the house endeavouring to gain admittance, and also when she went out endeavouring to get into this exhibitant's company and into conversation with her, insomuch that this exhibitant was obliged at length to refrain from leaving the house, except in a carriage or attended by a male servant, and which protection this exhibitant had never been obliged to resort to when at Harrowgate on former occasions. That as these annoyances continued to increase, and one of the letters stated the intention of the said *R. Dunn* to come to this exhibitant, this exhibitant became alarmed for her personal safety, and was obliged to have recourse to the magistracy of the neighbourhood, and in consequence of the complaint of this exhibitant, and upon the information sworn to by her and by other persons, the said *R. Dunn* was apprehended, and, on or about the 29th day of September, 1838, was ordered and adjudged by justices of the peace for the said county of York to enter into his own recognisances in the sum of 500*l* and to find two sureties in the sum of 250*l* each, or one surety in 500*l*., to keep the peace, and to be of good behaviour towards her Majesty and all her liege people, and especially towards this exhibitant, until the 16th day of October then next, which was the first day of the then next session of the peace for the said riding. And for want of such sureties the said *R. Dunn* was committed to the castle at York, and there remained until the said then next session, when, as this exhibitant had then left Harrowgate, and was induced to hope that such annoyance would not be renewed, this exhibitant did not at the then next sessions direct any legal proceedings to be instituted against the said *R. Dunn*, and at the said then next sessions the said *R. Dunn* was, as exhibitant was informed and believes, discharged from custody.

1840.  
The QUEEN  
v.  
DUNN.

1840.

The QUEEN  
v.  
DUNN.

Secoudly, this exhibitant on her oath saith, that no sooner was he the said *R. Dunn* discharged from custody as aforesaid than he came to London, where this exhibitant then was, and took lodgings at the Gloucester Hotel in Piccadilly, which is situate very near to the town residence of this exhibitant, and commenced a system of annoyance to this exhibitant by writing letters, endeavouring to procure interviews with this exhibitant, leaving cards and letters at the door of this exhibitant's house, and by watching and following this exhibitant both when in her carriage and whilst walking in the street, that this exhibitant became in consequence of these proceedings on the part of the said *R. Dunn* greatly alarmed for her personal safety and applied to Sir *Fred. A. Roe*, Baronet, the then chief magistrate of the police at Bow Street, on the 21st day of December, 1838, who, upon the information of this exhibitant sworn before him, issued his warrant for the apprehension of the said *R. Dunn*, and he was accordingly brought before the said Sir *Fred. A. Roe*, and was ordered to enter into recognisances, and to find sureties himself in 500*l.* and two sureties in 250*l.* each, to keep the peace towards this exhibitant. And this exhibitant saith, that while the informations were taking and reading before Sir *Fred. A. Roe* as aforesaid, the conduct of the said *R. Dunn* was so violent that it was with much difficulty he could be restrained, the officer in attendance being obliged for some part of the time to hold him by force, lest he should commit some mischief whilst the said Sir *Fred. A. Roe* was adjudicating upon the complaint of this exhibitant, so made as aforesaid. That the said *R. Dunn*, not having procured the required sureties, he was thereupon committed and remained in prison some short time, but was afterwards discharged on habeas corpus, in consequence of an informality in the warrant of commitment, as this exhibitant is informed and believes.

Thirdly, this exhibitant on her oath saith, that, since the discharge last aforesaid, this exhibitant has been subjected to repeated and constant annoyance, by letters being

addressed to her by the said *R. Dunn*, and by applications repeatedly made by that person at her house, and at the house of her father Sir *F. Burdett*, Baronet, that the said *R. Dunn* has also been continually observed walking up and down in front of the house of this exhibitant, and watching for opportunities to intrude himself into the company of this exhibitant, and since the month of August, 1838, down to the present time scarcely a week has elapsed without some letter or packet having been addressed by the said *R. Dunn* to this exhibitant, and delivered at her house. That on receipt of such letters, if the writing could be discovered to be that of the said *R. Dunn*, this exhibitant has not broken the seals, but in some instances the superscriptions have been in a different handwriting, in such instances the seals have been broken, as otherwise this exhibitant has immediately sent the same letters to her solicitor, in order that such proceedings might be taken against the said *R. Dunn* in respect of such letters, as the legal advisers of this exhibitant might judge proper. And this exhibitant has been informed and verily believes that all the said letters have been returned to the said *R. Dunn* with the exception of such as were in the judgment of this exhibitant's solicitor deemed necessary for the purposes of the proceedings at law already taken or to be taken against the said *R. Dunn*.

Fourthly, this exhibitant on her oath saith, that in the month of April last she was on a visit to her father, Sir *Francis Burdett*, Baronet, who was then staying at the Park Hotel, Norwood, in the county of Surrey, where this exhibitant went, accompanied by Miss *Meredith* (a friend of this exhibitant), on Saturday, the 18th day of the said month of April. That on the following day (Sunday) this exhibitant was attending divine service at Norwood church, and, as this exhibitant was informed and believes, the said *R. Dunn* came to the same church, and was afterwards seen in the road leading from the said church to the said hotel, watching for this exhibitant. That while this exhibitant was at

1840.

The QUEEN  
v.  
DUNN.

1840.

The QUEEN  
v.  
DUNN.

the said hotel she was occasionally in the habit of walking with her said friend, Miss *Meredith*, in the private grounds of the said hotel, and was frequently obliged to quit those grounds and take refuge in the said hotel, in consequence of the said *R. Dunn* appearing in the road and fields contiguous to the said hotel, and overlooking the grounds in which this exhibitant and her friend were walking, continually annoying and alarming this exhibitant, by waving his handkerchief and making gestures in the view of this exhibitant; that during the stay of this exhibitant at the said hotel, she was under the necessity of being closely attended by a man servant to protect her from the continual annoyance offered to this exhibitant, and from the personal injury which this exhibitant apprehended from the said *R. Dunn*. That on one occasion she was informed, by the said man servant, that the said *R. Dunn* had secretly got through the hedge from the public way into the private grounds, where this exhibitant and Miss *Meredith* were then walking, and was making towards the spot where this exhibitant was, whereupon this exhibitant and the said Miss *Meredith* were obliged immediately to retreat into the house, in order to escape from the personal insult and annoyance which this exhibitant verily believes the said *R. Dunn* then meditated; that it was this exhibitant's intention to have remained at the said hotel for the summer season, but in consequence of the said *R. Dunn*'s said conduct this exhibitant was compelled to abandon that intention, and this exhibitant in fact quitted the said hotel on Saturday, the 25th day of April, having been there for one week only, being afterwards afraid to return thereto for the reasons aforesaid.

Fifthly, this exhibitant on oath saith, that, after the return of this exhibitant from Norwood as aforesaid, a letter, written as this exhibitant believes by the said *R. Dunn*, dated from No. 10, King Street, St. James's, on the 18th day of May last, and addressed to this exhibitant, was delivered at this exhibitant's house in Stratton Street, in which said letter is the following passage, referring to a proposal

in the said letter, that this exhibitant should consent to meet the said *R. Dunn* (that is say), "If you refuse this request you will, when it is too late, repent a course the consequence of which will sooner or later fall on yourself and your family."

Sixthly, this exhibitant on oath saith, that on the 18th day of June instant, about one o'clock in the day, this exhibitant, accompanied by the said Miss *Meredith*, drove in this exhibitant's carriage to the Regent's Park, for the purpose of walking there; that when passing along Bond Street, at the end near to Piccadilly, this exhibitant saw the said *R. Dunn* on foot, walking in an opposite direction to that in which this exhibitant was driving, viz. towards Piccadilly; that when this exhibitant arrived in the Regent's Park, near to Sussex Place, this exhibitant and Miss *Meredith* got out of the carriage for the purpose of walking, and had proceeded a short distance, attended by the man servant before mentioned, when she was almost immediately accosted by the said *R. Dunn*, who came up and endeavoured to intrude himself into the company of this exhibitant and the said Miss *Meredith*; that this exhibitant, being greatly terrified, called up the man servant aforesaid, who placed himself between this exhibitant and the said *R. Dunn*, and thereby prevented the said *R. Dunn* from further interfering with or molesting this exhibitant, who by the aid of such protection was enabled, accompanied by the said Miss *Meredith*, to seek refuge in the house of Mrs. *Alexander*, a friend of this exhibitant, situate 15, Hanover Terrace, and where this exhibitant fortunately met both Mr. and Mrs. *Alexander* at home. That while this exhibitant was in the said house, the said *R. Dunn* knocked at the door, for the purpose of intruding himself into the said house in pursuit of this exhibitant, whereupon the said Mr. *Alexander*, observing the alarm and agitation under which this exhibitant and Miss *Meredith* were labouring, caused the said *R. Dunn* to be taken into custody and conveyed to the police court, High Street, Marylebone, where the said *R. Dunn* was, as

1840.

The QUEEN  
v.  
DUNN.



**CASES IN THE QUEEN'S BENCH,**

this exhibitant was informed and believes, bound in recognisances to appear at this present session, and to keep the peace in the mean time.

Seventhly, that on the occasion of the said last mentioned complaint at the police office at Marylebone as aforesaid, the said *R. Dunn*, as this exhibitant has been informed and believes, publicly stated that this exhibitant had entered into a correspondence with the said *R. Dunn*. And this exhibitant on her oath saith, that on no occasion whatever did she either directly or indirectly correspond, negotiate, or have any intercourse or communication with the said *R. Dunn*, or by any act, writing, word, look or gesture, encourage the said *R. Dunn* to address her; nor did she ever conduct herself so as to leave the said *R. Dunn* to believe that she, this exhibitant, either directly or indirectly sanctioned the said *R. Dunn* in addressing this exhibitant, but, on the contrary thereof, from the very first moment when the said *R. Dunn* began to annoy and terrify this exhibitant in manner aforesaid, this exhibitant hath placed the matter in the hands of her legal advisers, and hath directed them to take all necessary and proper steps to protect her from the annoyances which she has been subjected to by the conduct of the said *R. Dunn*.

Eighthly, this exhibitant on her oath saith, that she is unable to say whether the said *R. Dunn* is or is not of sound mind, but from the whole tenor of his conduct and demeanor towards this exhibitant, from the month of August, 1838, down to the present time, as well as his determined perseverance in such conduct, and from the premises before detailed in these articles, this exhibitant has deemed it unsafe, ever since she returned from Harrowgate as aforesaid, to leave her house without the attendance of a man servant, and hath abstained from walking, as she was wont to do, in Kensington Gardens, it being contrary to the regulations there to admit servants in livery therein. And this exhibitant for many weeks has felt it necessary to have the attendance of *Mr. Ballard*, or of some other of the Bow

1840.

The QUEEN  
v.  
DUNN.

Street officers, at her house in Stratton Street aforesaid, from the fear that personal violence or molestation would be attempted by the said *R. Dunn* against this exhibitant. And this exhibitant (except only when the said *R. Dunn* was confined in prison) from like fear absented herself when in town from public churches or places of worship, and hath attended divine service in a private chapel in Albemarle Street, where on some occasions the said *R. Dunn* intruded himself, and so acted as to create annoyance to this exhibitant, and to cause the interference of the clergyman there, who took measures of precaution for this exhibitant's comfort and safety. And this exhibitant is now in daily fear that some act of violence will be committed against this exhibitant, and that the said *R. Dunn* will do this exhibitant some bodily hurt. And therefore this exhibitant, unless she can have protection and security from the annoyance and violence which she fears and apprehends from the said *R. Dunn*, will be continually under restraint, terror and apprehension. This exhibitant therefore humbly prays that the said *R. Dunn* may be ordered, by this honourable Court, forthwith to find sufficient sureties for keeping the peace towards this exhibitant, and be thereby restrained from further molesting, annoying and terrifying this exhibitant.

And lastly, this exhibitant saith, that she doth not make this complaint against the said *R. Dunn* through any hatred, malice or ill will which she hath or beareth towards him, but merely for the preservation of her life and person from bodily harm.

*Wm. Ballard*, of No. 3, Chapel Place, Cavendish Square, in the county of Middlesex, retired officer of police, maketh oath and saith, that in the month of September, 1838, this deponent was an officer attached to the public office, Bow Street; and in that month, by permission of Sir *Fred. Adair Roe*, Bart., the then chief magistrate, and upon application and statement on behalf of Miss *A. G. B. Coutts* that she was in danger of her life or some bodily harm from a man of the name of *Richard Dunn*, this deponent was despatched

1840.

The QUEEN  
v.  
DUNN.

to Harrowgate, in the county of York, for the purpose of affording protection as a peace officer to the said Miss *Coutts*. That having arrived at Harrowgate, a warrant was placed in the hands of this deponent by one of the magistrates of the said county of York, whereupon to apprehend the said *R. Dunn*. That on Wednesday, the 26th of September, 1838, this deponent saw the said *R. Dunn* upon a public place called the Stray, at Harrowgate, going in a direction towards and near the residence of the said Miss *Coutts*, when this deponent told him he had a warrant against him on the complaint of the said Miss *A. G. B. Coutts*: that the said *R. Dunn* asked deponent for what; that deponent told him that she was in fear that he (meaning *R. Dunn*) would do her some bodily harm. That the said *R. Dunn* told deponent he was not going near her: that deponent asked *R. Dunn* how he could say so, when he had written to Miss *Coutts* to say he was coming: that *R. Dunn* then admitted that it was so, and said, if she has done this she is worse than the damndest whore that ever walked the streets; that the said *R. Dunn* repeated this language two or three times to deponent. That subsequently the said *R. Dunn*, on speaking of some former depositions taken before Mr. *Rhodes* and Mr. *Paley*, two of the justices of the peace for the county of York, said that he told Mr. *Rhodes* that if Miss *Coutts* had done that or said that, she (meaning Miss *Coutts*) deserved to be tarred, feathered and burnt. And this deponent further saith, that having taken the said *R. Dunn* into custody on the said warrant, he was conveyed before a bench of magistrates at Knaresborough, and after the deposition of Miss *Coutts* and of this deponent and other persons were taken, the said *R. Dunn* was ordered to find sureties to keep the peace, and committed to York Castle for want of such sureties until the next session. And this deponent further saith, immediately after the said sessions, when *R. Dunn* was set at liberty, which was about the 16th of October, 1838, he came to London, and took lodgings at the Gloucester Hotel,

Piccadilly. That in consequence of repeated annoyances which this deponent was informed were still committing by the said *R. Dunn* against the said Miss *A. G. B. Coultts*, and from her apprehended danger, this deponent was again deputed to attend her at her house, and this deponent was relieved occasionally by another officer named *Fall*, and was employed from the middle of the month of October, 1838, to the 24th of December following, during which period this deponent, except when relieved by *Fall* as aforesaid, resided day and night in the house of the said Miss *Coultts*, in Stratton Street. That in consequence of fresh annoyances which the said Miss *Coultts* had been subjected to while away from home in her carriage and walking, a warrant was granted against the said *R. Dunn*, and placed in this deponent's hands, and upon which this deponent took the said *R. Dunn* into custody at the said Gloucester Hotel. That after this deponent had so taken the said *R. Dunn* into custody, the said *R. Dunn* spoke of the said Miss *Coultts* in a most reproachful manner, swore and blasphemed respecting her very much, the particulars of which and the exact language used by him this deponent cannot minutely recollect, in consequence of the length of time since which the occurrence took place, but which language this deponent deposed to immediately afterwards, before the said Sir *Fred. A. Roe*, at the public office, Bow Street, in the presence and hearing of the said *R. Dunn*, which expressions were so gross and offensive, and so calculated to excite fear and alarm, that this deponent verily believes the said Miss *Coultts* had good cause for fear that injury or bodily harm might be done to her by the said *R. Dunn*. And this deponent further saith that while the said magistrate, Sir *Fred. A. Roe*, was adjudicating on the case, the said *R. Dunn* behaved so violently that this deponent, by order of the said magistrate, stood near to and held the said *R. Dunn* fast by the collar, and the said Sir *Fred. A. Roe* admonished the said *R. Dunn* that in case he would not be quiet he should be obliged to order him to be hand-

1840.

The QUEEN  
v.  
DUNN.

1840.

The QUEEN  
v.  
DUNN.

cuffed. And this deponent further saith that, notwithstanding the said admonition, the said *R. Dunn*, while waiting for the commitment to be made out, actually took up the examinations and depositions which had been put down near him by the magistrates' clerk, and destroyed the whole of them, throwing fragments into the grate, so that no portion of the said depositions remained, and when this deponent remonstrated with the said *R. Dunn* for having done so, he took up the poker from the fireplace to strike deponent, and threatened to do so, but this deponent wrested the poker from him, and he was ultimately committed to gaol for want of sureties, but was afterwards released on habeas corpus in consequence of a defect in the commitment. That after he came out of prison on such last occasion, this deponent was again sent by the magistrates of Bow Street to reside and did reside for a considerable time in the house of the said *Miss Coutts*, in Stratton Street, in order to protect her from any further apprehended violence by the said *R. Dunn*. And this deponent further saith that from what he has seen of the conduct of the said *R. Dunn*, and from the expressions used by him to this deponent with reference to the said *Miss A. G. B. Coutts*, both at Harrowgate and when in custody in London, this deponent believes the said *R. Dunn* is fully bent upon personally annoying the said *Miss Coutts* in every way and whenever he has an opportunity of doing so. And this deponent further saith that he believes that the said *Miss Coutts* is in constant danger of the said *R. Dunn* doing her some personal injury.

*Wm. Weedon*, footman to *Miss A. G. B. Coutts*, of Stratton Street, Piccadilly, in the county of Middlesex, maketh oath and saith that he has frequently seen *R. Dunn* parading before the house of this deponent's mistress, *Miss A. G. B. Coutts*, situate in Stratton Street, Piccadilly, and that deponent has also frequently seen the said *R. Dunn* following her carriage, looking into and towards it. That on Sunday, the 19th day of April last, this deponent was at

Norwood with the said Miss *Coutts*, where she was staying on a visit to Sir *Francis* and Lady *Burdett*, at the Park Hotel. That deponent saw the said Mr. *Dunn* coming out of the church at Norwood, where the said Miss *Coutts* had been attending divine service, and after church this deponent saw the said *R. Dunn* walking up and down and watching the Park Hotel at Norwood, and the grounds contiguous and belonging thereto. And this deponent further saith that on the Tuesday following, and, as deponent believes, almost daily during that week, this deponent saw the said *R. Dunn* walking up and down the road and field overlooking the grounds of the said hotel, apparently having no lawful object in doing so, but watching as if looking for some person in the premises of the said hotel. That on one of the days, but this deponent cannot recollect the exact day, between Tuesday, the 21st of April, and Saturday, the 25th of the same month, the said *A. G. B. Coutts* was walking with Miss *Meredith* in the grounds belonging to the said hotel; that deponent then saw the said *R. Dunn* cross a ditch and get through a gap in the hedge into the private grounds of the said hotel, and go towards the place where the said Miss *Coutts* and Miss *Meredith* were: that deponent immediately went and informed the said Miss *Coutts*, when she and Miss *Meredith* went directly into the house; after which the said *R. Dunn*, on seeing this deponent, went back by the same way he had come into the grounds, and deponent saw nothing more of him that day. And this deponent further saith that on the 18th day of this present month of June, he accompanied the carriage as footman to attend Miss *Coutts* and Miss *Meredith* to the Regent's Park, that when in the park, near Sussex Place, the said Miss *Coutts* and Miss *Meredith* got out of the carriage to walk, when almost immediately the said *R. Dunn* came up and got close to the said Miss *Coutts*, and was about to address her, when the said Miss *Coutts* turned round to this deponent for assistance, and this deponent immediately placed himself between Miss *Coutts* and the said *R. Dunn*, and

1840.

The QUEEN  
v.  
DUNN.

1840.

The QUEEN  
v.  
DUNN.

put him the said *R. Dunn* on one side. That Miss *Coutts* and Miss *Meredith* then went to Mr. *Alexander's* house, who resided at No. 15, Hanover Terrace, and whilst there the said *R. Dunn* came out of the public road within the terrace before the houses, knocked at Mr. *Alexander's* door, and asked deponent if his mistress (meaning the said Miss *Coutts*) was there; that deponent told the said *R. Dunn* he did not wish to have anything to say to him. That the said *R. Dunn*, after waiting some time for the purpose of seeing (as deponent believes) the said Miss *Coutts*, but seeing the said deponent watching him, walked away before the door was answered, and deponent did not see him afterwards, but understood that he was afterwards taken into custody. That this deponent verily believes, from what he has witnessed of the conduct and manner of the said *R. Dunn* upon several occasions, that the said Miss *Coutts* is in personal danger, and has reason to be in constant fear of him.

*William Weedon.*

Sworn by the several deponents above named  
in open court, at the General Quarter Ses-  
sion of the Peace, held in and for the  
county of Middlesex, at the Session House  
for the said county, on Monday, the 29th  
day of June, 1840.

*Richards.*

*Wm. H. Bodkin.*

It is ordered that the said *R. Dunn* do enter into his own recognisance in the sum of 500*l.* and find two sureties in the sum of 250*l.* each, to appear at the next General or Quarter Session for this county after the expiration of two years, and in the mean time to keep the peace and be of good behaviour towards all her majesty's liege subjects, and particularly towards Miss *A. G. B. Coutts* (the exhibitant of the above articles), and that forty-eight hours' notice of bail be given to Mr. *W. C. Humphreys*, 119, Newgate Street, the solicitor for the said exhibitant, before the same be taken. By the Court.

*Heaton Ellis*, Clerk of the Peace."

The defendant in person moved (a) for his discharge on the following grounds :—

1840.  
  
 The QUEEN  
 v.  
 DUNN.

1. That his previous discharge in respect of some of the same matters which were the foundation of the articles, rendered his committal illegal within the Habeas Corpus Act, 31 *Car.* 2, c. 2, s. 6.

2. That the statements contained in the articles were false; and this he contended he had a right to shew by affidavit under 56 *Geo.* 3, c. 100. [Lord *Denman* C. J. The only fact you can dispute is the fact of your committal by the order of sessions alleged.]

3. That the articles of the peace were bad on the face of them, because they did not appear to have been exhibited on oath, as they were on the same parchment with the affidavits, and had no distinct jurat. The defendant referred to *Rex v. Parnell* (b) and *Rex v. Mackenzie* (c). [Lord *Denman* C. J. The “several deponents above named” in the jurat at the end is quite enough.]

4. That the order of sessions was illegal and unconstitutional, as the sessions had no power to bind over except from sessions to sessions, and the offence, for which defendant was to answer, required him to appear after the expiration of two years, and that, even if not invalid on that account, it stated no period when the term of two years was to commence or end, or at what place he was to appear.

5. That the articles set out no breach of the peace nor threat of such breach, nor any facts from which any reasonable person could apprehend the defendant intended to do the exhibitant any grievous bodily harm; referring to *Hawk. P. C.*; and also that the letter referred to in the articles should have been set out fully. [Lord *Denman* C. J. (stopping the defendant,) we should wish to hear the other side as to the sufficiency of the grounds stated in the articles.]

(a) The case was argued on the 4th and 5th November before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.  
 (b) 2 Burr. 806.  
 (c) 3 Burr. 1922.



1840.  
  
 The QUEEN  
 v.  
 DUNN.

Sir *J. Campbell* A. G., *Bodkin* and *Chambers*, contra. The question is, whether the returns set out a sufficient cause of commitment on the face of them. No objection has been raised to the return to the habeas corpus; but it has been argued that the return to the certiorari, setting out the articles of the peace, shews that the quarter sessions have acted without jurisdiction, and therefore that the order of commitment, founded on such articles, is a nullity, and that Mr. *Dunn* is consequently entitled to his discharge.

There can be no doubt that a party who apprehends bodily danger from another is entitled to articles of the peace; and, if the court that has authority to grant such articles sees reasonable ground for thinking sureties of the peace are necessary, no other tribunal can control its decision. The power of justices to grant articles of the peace is derived from the language of their commission. It is laid down in *Hawkins* that if a party swears he is under personal fear from another, and the application is made without malice, the justices are bound to grant articles of the peace (*a*). Jurisdiction in this matter is given either to a single justice or to the quarter sessions; but in either case they are the judges of the whole matter; they are to judge if the party is really in fear, and if he is so upon reasonable grounds. This Court has the same jurisdiction at common law: but where the quarter sessions has an undoubted jurisdiction over the matter, this Court does not sit as a court of appeal from them. [*Coleridge* J. Your argument would shew that a single magistrate has a jurisdiction to the same extent as the quarter sessions have.] That was decided in *Willes v. Bridger* (*b*). In *Rex v. Tregarthen* (*c*), where a party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another, and the magistrate, upon hearing the complaint, required the latter

(*a*) 1 Hawk. P. C. bk. 1, ch. 28,  
 ed. Curwood.

(*b*) 2 B. & Ald. 278.

(*c*) 5 B. & Ald. 678; 2 N. & M.  
 379.

to enter into recognisances to keep the peace, on motion to this Court to discharge the recognisances, on the ground that the language used was in a metaphorical sense only, the Court refused to interfere, because it was for the magistrate to judge in what sense the language was used; and *Parke J.* observed, in giving judgment, "the magistrate having, in the exercise of his discretion, thought that there was ground for requiring the defendant to enter into recognisances to keep the peace, this Court cannot interfere." [*Coleridge J.* The language of the judgment in that case need not have gone so far, because one interpretation of the words used might have conveyed the cause of bodily danger: but suppose a case in which no bodily danger could be inferred, as, for instance, the mere waving of a white handkerchief?] Even in that case this Court would not interfere; it will not presume that an inferior court will abuse its jurisdiction. An action might lie for maliciously preferring articles of the peace; but there is no power to review the proceedings of the inferior court. In *Rex v. Holloway* (a) it was held that this Court could not interfere to reduce the amount of security which the magistrates required a defendant to give for the preservation of the peace; nor would they interfere as to the period for which such security was required. In either case there might be a great abuse, and this Court might grant a criminal information against the magistrate, or the Chancellor might strike him out of the commission; but this Court could not review his decision. [*Coleridge J.* In *Rex v. Bringle* (b) the prosecutrix swore that the defendant had threatened to do her business, and the defendant by affidavit wished to explain the words, and shew that they did not mean any personal harm to her, but that they related to a lawsuit then depending between them. The Court would not allow him to controvert the fact, and said he could take no other advantage than what arose from any ambiguity in

1840.

The QUEEN  
v.  
DUNN.

(a) 2 Dowl. P. C. 525.

(b) 13 East, 174, n.

1840.

  
 The QUEEN  
 v.  
 DUNN.

the expression on the face of the articles ; that the expression used by the defendant was an ambiguous one, and capable of more meanings than one ; but, as the articles also charged that he had several times threatened the life of the prosecutrix, they thought that was a sufficient charge to support the articles. But suppose a question arose on the breach of recognisances, and the breach assigned was such an act as I have mentioned, namely, the waiving a white handkerchief,—we might be called on to say whether this act were a breach of the recognisances ; can we not then judge of the same fact on which the sureties are ordered to be entered into ?] There are many cases which would justify the ordinary recognisances to be entered into, which yet would not amount to a breach of such recognisances : sureties of the peace are granted to a party *quia timet*, and there may be many acts shewing a disposition to break the peace, which might not, *per se*, amount to a breach. This Court therefore cannot, *à priori*, judge that such and such acts would not warrant the quarter sessions in granting sureties.

There are many cases in which there is no appeal from the decision of magistrates. Suppose a party convicted under the New Police Act, for using language likely to create a breach of the peace ; however frivolous the language might have been, the party would have no redress by appeal to this Court. No case is to be found where, after adjudication by the court below, on a subject-matter within their jurisdiction, this Court has reviewed their decision. [Coleridge J. The old books are full of cases in which articles of the peace cannot be exhibited, such as where a master has threatened to beat his servants. Suppose it appeared that the articles had been exhibited in such a case as that, could not this Court interfere ?] It is submitted they could not. The fact that the party had been put in bodily fear has been found by a competent jurisdiction. [Coleridge J. But the jurisdiction is only a limited one. In the analogous case of sureties for good

behaviour, the justices may commit parties for "suspicion;" but it has been held that the commitment must set out the cause for suspicion.] *Dalton*, in describing the duties of a justice of the peace, says, that it consists "in preventing the breach of the peace (wisely foreseeing and repressing the beginning thereof) by taking surety for the keeping of it, or for the good behaviour of the offenders, as the case shall require (a)."

1840.  
  
 The QUEEN  
 v.  
 DUNN.

They then argued upon the affidavits that they disclosed sufficient facts to have justified this Court in exhibiting articles if there had been an original application to them.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—Articles of the peace having been exhibited before the Court of Quarter Sessions for this county, by Miss *Coutts*, against *Richard Dunn*, and that court having required him to find sureties to keep the peace and be of good behaviour, which he has failed to do, and was thereupon committed to prison, he has sued out his writ of habeas corpus to appear before us, the return to which states this fact in short and general terms. But the defendant has also brought before us by certiorari the original order of the court, referring to and incorporating the articles exhibited, and two affidavits sworn in support thereof, which are (as he maintains) insufficient in point of law to give the court jurisdiction to compel him to find sureties, and consequently insufficient to warrant them in sending him to prison for his default.

One of the grounds on which we were urged to remand the prisoner may be at once removed. The articles were discussed at length, and it was argued that, even if they were now submitted to us with the prayer that we should order sureties to be found by the prisoner, we, in the exercise of our discretion, should undoubtedly feel it our duty to take the step which has been taken by the Court of

1840.

The QUEEN  
v.  
DUNN.

Quarter Sessions. But against this point there is one decisive observation. Whatever we might think of the defendant's conduct, an essential part of it, for the purpose of the prosecutrix, is a letter written to herself; but that letter is not set forth or in any way accounted for; only a short extract is made, of very ambiguous meaning. We should have required to see the entire letter, and should not have acted on any selection from it.

Another ground taken was, that the Court of Quarter Session is a court of competent jurisdiction to direct sureties of the peace on articles exhibited, and must therefore have power both to exercise a discretion over the cases in which that security is sought, and to decide upon the proof of the facts on which their discretion is exercised. As to the former objection, it may be enough on this occasion to observe, that the Court of King's Bench has in fact controlled the decision of the justices, whether in or out of sessions, to a much greater degree than was supposed at the bar (see *Rudyard's case*, 2 Vent. 22, especially the judgment of *Tyrrel J.*): the latter requires more examination.

The power of the justices of the peace in this behalf is traced to a statute of *Edw. 3*, which was made the foundation of the commission of the peace, though some have thought that it did not warrant the crown in granting so large an authority. We cannot question the validity of the commission, which has been in operation for centuries; but the justices of the peace on the other hand cannot give themselves jurisdiction in any case. They cannot go beyond the terms and fair meaning of the commission. The terms were quoted from *Burn's Justice* in the course of the argument. The fair meaning is, that if one person informs the court or a justice of the peace that he goes in fear and in danger of personal violence from another, by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted. Unless such a case appear, no jurisdiction appears; nor can we ever infer facts necessary to give jurisdiction from the mere

1840.

The QUEEN  
v.  
DUNN.

umstance of an inferior court assuming to act as if they  
essed it; least of all where, by the exercise of a discre-  
ary power on an ex parte statement, which is not allowed  
e contradicted, a single magistrate may deprive the sub-  
of his personal freedom. An opportunity must there-  
be given for arguing the validity of the act done by the  
ions or magistrate, and, unless this may be done by  
ns of the writ of certiorari, it could never be done at all  
re the gaoler makes a general return to the habeas  
pus.

The prisoner makes this objection to the present articles.  
threat is alleged upon them. We may observe that no  
cedent has been found in the reports of articles of the  
ce, which omit to state in terms that the exhibitant was  
atened or the fact of such language being employed, as  
court could not fail to see conveyed a threat. Where  
is left doubtful, (as in *Bringloe's* case (*a*),) the Court will  
bind over the party. *Rex v. Tregarthen* (*b*) only shews  
, where threats were sworn to, this Court will not inquire  
whether they were used in their natural sense. Among  
as not reported we have examined the articles exhibited  
the Marquis of Hertford in 1825. His application was  
cessful, though the word "threat" did not appear in his  
cles; but he swore that there had been an assault, and  
defendant had said that he would repeat it on the occur-  
ce of an event which might have happened at any time.  
brother Coleridge has also found a case in 6 *Mod.* 131,  
er the title of *Dennis v. Dr. Lane*, which bears much  
mbulance to the present.

Mrs. *Dennis* was a widow, and had a daughter who was  
reiress to 800*l.* a year, to whom the Doctor made love.  
mother thereupon forbade him her house, yet he came  
another day, and meeting the mother upon the stairs,  
withstanding she then again expressly forbade him to go  
ward, he pushed on to the young woman's chamber in a  
e manner. This behaviour frightened the daughter's

(*a*) 13 East, 174, n.

(*b*) 5 B. & Ad. 678; 2 N. & M. 379.

1840.

THE QUEEN  
v.  
DOCTOR.

mother so much that she sent for friends to conduct her daughter to London, of which the Doctor having intelligence came with three others and followed the daughter, and came to the same inn where they lodged at night, and took up the adjoining rooms to the mother and daughter, whereby they put the mother into fits for fear; and the next morning, as they were taking coach, the Doctor assaulted the gentleman that put the lady into the coach, and pursued them again that day, and gave out that he would force the daughter from them, so that the mother was fain to hire men to guard the inn that night. This matter was transacted in March was twelve months. The Doctor, at the last assizes at Hereford, meeting this gentleman, who was the principal manager of the family and helped to guard the daughter to London, he being a barrister at law, and a near relation to the young lady, in his gown, assaulted him and beat him with a cane; whereupon the judge of assize bound him to appear the first day of this term in this Court. And upon all this matter being put together, and an oath by her that she believed the assault upon her kinsman to be in pursuance of the design upon her daughter, and that she was informed he threatened her, and endeavoured to corrupt her daughter's maid, to facilitate his stealing her daughter;—*Per Curiam*—The Doctor's coming in that manner, in despite of the mother's prohibition and against her will, was good cause to require the security of the peace, and so was the ensuing behaviour of the Doctor upon the road. Secondly, This demand of the security of the peace ought to be fresh after the fray or cause of fear given; and therefore, if it had not been for the new assault upon the kinsman, the Court would not bind him to the peace here; for the suffering considerable time to pass before the demand of security, is a great sign that the party was not afraid; but here there being an old offence, which one ought to give security of the peace for, and a fresh occasion given, which gives probable reason to believe the old grudge continued, the COURT ordered him to give security to keep

the peace, and took his own recognisance in 200*l.* and that of two more in 200*l.* each, but refused to bind him to his good behaviour, because of the length of time, though they declared that, if they had come when the matter was fresh, they would have bound him to his good behaviour in a much greater sum."

1840.  
  
 The QUEEN  
 v.  
 DUNN.

The form of the articles does not appear; but the circumstances were very much stronger, and would well warrant a statement—by the mother herself, that she had been threatened, for there was a manifest intention to deprive her of her daughter by personal violence,—as well as by the daughter that she apprehended forcible abduction. This case may then be said to prove that threats need not be by word of mouth directed against the exhibitant, but that looks, gestures and conduct may express them with equal force. And this is not to be denied. But the invariable rule is, that where reliance is placed on a general fact, which may be inferred from particular facts, but does not flow from them by necessary implication, the party shall draw that inference himself, and swear to his belief of its correctness, and not leave the Court to draw the inference instead of him.

If this prisoner's conduct did not amount to the threat of personal violence, the justices had no power to bind him over; but, if it did, the exhibitant ought to have so stated in the articles, which are defective by reason of the omission.

In arriving at this conclusion—most reluctantly we may add, considering how seriously the happiness and comfort of the prosecutrix may be placed in hazard by the prisoner's perseverance in the conduct which has been detailed—we by no means decide that that conduct alone may not have been an actual menace of violence. On the contrary, if it should be repeated, and then brought before us, coupled with former outrages, in a proper form, and so as to fall within the rules that have always hitherto prevailed, we might probably feel but little doubt of the propriety of the conclusion that menaces had been used.

That the former proceedings of the prisoner may be



1840.

The QUEEN  
v.  
DUNN.

again referred to, as giving a character to those of recent date, no doubt can be entertained, notwithstanding the argument derived by him from 56 *Geo. 3* ; for in the case of *The King v. Mendez* (a) the prosecutor was allowed to rely on a fact, which had been pardoned by the act of grace, as an inducement to the Court to believe the defendant a dangerous person. The same reference to former facts was permitted in *Dr. Lane's* case. And this is not inconsistent with the 56 *Geo. 3*, which merely prohibits a second punishment for the same offence, but never intended to preclude the Court from forming its judgment on the necessity of restraining outrage on consideration of all the circumstances which make it probable.

Perhaps the law of England may be justly reproached with its inadequacy to repress the mischief and obviate the danger which the prisoner's proceedings render too probable ; and we may naturally feel surprise if none of the numerous police acts have made specific provisions for that purpose. But the power of the sessions and of the justices of the peace to make the order, now challenged before us, depending wholly on the words of the commission, and those words not being satisfied by the articles exhibited, we are bound to decide that the prisoner must be discharged.

Prisoner discharged.

Sir *J. Campbell* A.G., immediately after the delivery of the judgment, submitted that upon all the facts the Court had now jurisdiction to require the defendant to give security for his good behaviour.

Lord DENMAN C.J.—We think it must be taken that our judgment disposes of the whole matter up to the present time.

(a) 1 *Strange*, 473.

A.

1840.

CARPENTER v. MASON, Esq. and another.

Wednesday  
November 4.

**TRESPASS**, for assaulting and imprisoning the plaintiff, and taking him to a house of correction, until he paid 35/.

Plea, not guilty "by statute."

At the trial before *Littledale J.*, at the Nottingham summer assizes, 1840, it appeared that the plaintiff, who was the relieving officer of a union, had been convicted by the defendants, who were magistrates, under 4 & 5 Will. 4, c. 76, s. 97, which enacts, that "if any overseer, assistant overseer, master of a workhouse, or other paid officer, or any other person employed by or under the authority of the guardians, shall purloin, embezzle, or *wilfully* waste or misapply any of the monies, goods, or chattels, belonging to any parish or union, every such offender shall upon conviction before any two justices, forfeit and pay for every such offence, any sum not exceeding 20/. and also treble the amount or value of such money, goods, or chattels, so purloined, embezzled, or misapplied." The defendants had committed the plaintiff under section 99 of the act, for non-payment of the penalty imposed, and justified, under a conviction which proceeded on an information charging "that he had misapplied" parish monies. The learned judge was of opinion, that the information was bad, as it did not charge that the plaintiff had "wilfully" misapplied the monies, and directed a verdict for the plaintiff, reserving liberty to the defendants to move to enter a nonsuit.

By 4 & 5  
W. 4, c. 76, s.  
97, "if any  
overseer, &c.  
shall purloin,  
embezzle, or  
wilfully waste  
or misapply,  
any of the mo-  
nies, &c. be-  
longing to any  
parish &c.  
every such  
offender shall,  
upon convic-  
tion before any  
two justices,  
forfeit for  
every such  
offence any  
sum not ex-  
ceeding 20/."  
&c.

*Held*, that  
an information  
against a pa-  
rish officer for  
"misapplying"  
without the  
word "wil-  
fully" was  
bad.

*M. D. Hill* now moved accordingly, and contended that the statute applied to any wrongful application of parish money, and that the word "wilfully" therein was connected with the word "waste" only immediately following, or that the word "misapply" in the information signified such a reckless employment of the parish money as to carry with it the word "wilful."

Lord DENMAN C. J.—"Misapplication" of itself does not import any thing "wilful." Suppose the plaintiff had

1840.

~  
 CARPENTER  
 v.  
 MASON.

been imposed upon by one who personated a pauper, and had applied the parish money in relieving him, that would be a misapplication, but of a different character from that provided against by the statute.

LITLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

Tuesday,  
 Nov. 24th.

The QUEEN v. The Justices of WORCESTERSHIRE.

Where a parish has several districts, each having its own chapel, and separately maintaining its own poor, notice on the chapel door of that district alone for which the poor rate is made is sufficient publication within 1 W. 4 and 1 Vict. c. 45, s. 2.

*GRAY* had obtained a rule calling upon the defendants to shew cause why a mandamus should not issue commanding them to grant a warrant of distress on the goods of one *Woodward*, in the parish of St. Andrew, Pershore, for the amount of a poor rate. The defendants had refused to issue their warrant, on the ground that notice of the rate had been affixed on the door of the church of St. Andrew, Pershore, only, whereas the parish also contained five chapelries, each having a chapel of its own, and that therefore the rate had not been duly published, within the meaning of 7 Will. 4 and 1 Vict. c. 45, s. 2 (a). It appeared that the five chapelries had existed as far back as could be traced, and had been treated and reputed as distinct parishes, each making its own rates and maintaining its own poor separately, and altogether unconnected for parish purposes either with each other or the rest of the parish of St. Andrew. The rate in question was made at a vestry meeting for the residue of the

(a) The section enacts, "That all proclamations or notices, which, under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof &c. shall, previously to the commencement of divine service, on the several days on which such proclamations or notices have heretofore been made or given in

the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches or chapels within such parish or place, and such notice, when so affixed, shall be in lieu of, and as a substitution for, the several proclamations and notices so heretofore given as aforesaid, and shall be good, valid, and effectual to all intents and purposes whatsoever."

parish, which residue also maintained its own poor separately from the five chapelries, and was itself a reputed parish, and the rate did not extend to any of the chapelries. *Woodward* was assessed as an occupier within the residuary district for which the rate was made.

1840.  
 The QUEEN  
 v.  
 Justices of  
 WORCESTER-  
 SHIRE.

*Sir F. Pollock* and *R. V. Richards* in shewing cause contended, that the statute in terms required publication of the rate on all the chapels.

*Cresswell, Whitmore* and *Gray* contra. "Place" in the statute means any separately rateable district.

**LORD DENMAN C. J.**—The recent statute merely substitutes a written notice for the oral notice formerly required by 17 *Geo. 2*, c. 3, s. 1, to be given "in the church." The notice is now to be affixed to the doors of all the churches or chapels within "such *parish* or *place*." In the *place* in question there is one church only, and notice has been given there.

**LITTLEDALE** and **WILLIAMS Js.** concurred.

Rule absolute.

**BRANSON v. DIDSBURY.**

*Thursday,*  
*Nov. 5th.*

**TROVER** for a snuff-box. The plaintiff had obtained a verdict. Damages 8*l*.

The rule, that a new trial will not be granted where the verdict is against evidence if the damages are under 20*l*., applies to cases of surprise and to actions of trover.

*Knowles* now applied for a new trial, on the ground of surprise, contending that the rule against granting a new trial, where the damages were under 20*l*., did not apply in cases of surprise, or to actions of trover.

**LORD DENMAN C. J.** said that, as the damages were so low, the case was within the rule commonly applied to verdicts against evidence, and that the rule must be refused.

**LITTLEDALE, WILLIAMS** and **COLERIDGE Js.** concurred.

*A.*

Rule refused.

1840.

Thursday,  
Nov. 12th.

## The QUEEN v. QUAYLE.

A statement in an affidavit for a quo warranto information against a town councillor, that the defendant had taken on himself the office, and had been seen acting as a councillor at two meetings of the town council, is sufficient.

SIR W. W. FOLLETT in Hilary term had obtained a rule nisi for a quo warranto information, calling on the defendant to shew cause by what authority he claimed to be a councillor of the corporation of Liverpool, upon the ground that another candidate had the majority of legal votes. In the affidavits it was stated (*inter alia*) that the defendant "had taken upon himself the office of a councillor of the said borough, and had acted in that capacity;" and one of the councillors stated in his affidavit that he had attended two meetings of the town council, and had seen the defendant "present at the said meetings, and acting as a councillor for the said corporation."

Sir J. Campbell A. G. and Crompton shewed cause, and contended that it did not sufficiently appear from the affidavits that the defendant had actually exercised the office. In *Reg. v. Slatter (a)*, the statement in the affidavit that a party had accepted the office was held insufficient; the acts which constitute acceptance should be also stated.

*Kelly* and *G. Henderson* *contra* were not heard.

LORD DENMAN C. J.—This case is distinguishable from *Reg. v. Slatter (a)*, as it is here sworn the defendant has acted in the office.

WILLIAMS J. concurred. (b).

A.

Rule absolute (c).

(a) 3 P. & D. 263.

(b) *Littledale* and *Coleridge* Js. were absent.

(c) The facts disclosed in this case also gave rise to the question, whether the burgess roll could be

opened in contesting the election of councillor. It was not necessary to decide whether this could be done, but Lord Denman C. J. seemed to think that it might in some cases be proper.

1840.



Friday  
November 6.

WILLIAMS *v.* BURGESS and another, assignees, &c.

TRESPASS, for taking the plaintiff's goods.

Pleas: 1. Not guilty. 2. That the goods were not the property of the plaintiff.

At the trial before *Coleridge J.* at the Bristol summer assizes, the plaintiff had a verdict for 24*l.* subject to a motion to reduce the damages to 10*l.* if the Court should be of opinion that a warrant of attorney, executed by a party who had subsequently become bankrupt, and on which the plaintiff relied, was not filed in time, under 3 *G.* 4, c. 39, ss. 1 and 2, as against the defendants, who were assignees of the bankrupt. The warrant in question was executed at 9 A. M. on the 9th December, and was not filed until after 9 A. M. on the 30th of the same month.

Under 3 *G.* 4, c. 39, which makes void, as against the assignees of a bankrupt, any warrant of attorney executed by him, unless filed "within 21 days after execution," the days are to be reckoned exclusively of the day of execution, and a warrant, therefore, executed on the 9th is duly filed on the 30th of the month.

*Bompas Serjt.* now moved to reduce the damages accordingly. The warrant of attorney was not filed *within* twenty one days after its execution, as required by 3 *G.* 4, c. 39, ss. 1 and 2. Sect. 1 enacts, that the warrant of attorney "shall within twenty one days after the execution of such warrant of attorney be filed," and sect. 2 enacts, that "if at any time after the expiration of twenty one days, next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or copy thereof shall be filed as aforesaid *within the said space of twenty one days from the execution thereof*, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to have back, and receive for the use of the creditors of such bankrupt at large, all and

1840.

WILLIAMS  
v.  
BURGESS.

every the monies levied, or effects seized, under and by virtue of such judgment and execution." As the filing is required *within* twenty one days of the execution itself, and not after the *date* of execution, the day of the execution should be included, for otherwise the period of the twenty one days will always be exceeded by some hours, unless the warrant has been executed at the last moment of the day. According to the rules of Court for the computation of time, and to many authorities, the first day in a case like the present is to be included, and the last excluded. Wherever time is to be computed from an act done, especially where the party against whom the time runs is privy to the act, the day on which the act was done is to be included. The authorities on the subject are cited in *Blunt v. Heslop* (a). That case decided, that an attorney cannot sue for his bill of costs until one month after its delivery, exclusively of both the day of delivering the bill and of commencing the action. But the 2 Geo. 2, c. 23, s. 23, says, that no attorney shall sue for his bill "until the expiration of one month or *more* after" its delivery, and *Patteson* J. observed in his judgment, "Whatever may be the case, where the thing is to be done *within* such a time after an act done, Mr. *Alexander's* construction is correct here, where the action is not to be brought until the expiration of one month or more after the delivery of the bill." [*Littledale* J. The words of the annuity act, 17 Geo. 3, c. 26, s. 1, requiring an annuity deed to be inrolled "*within* twenty days of the execution," are very like the words in this act, and in *Ex parte Fallon* (b) it was held that the twenty days were to be reckoned exclusive of the execution.]

LORD DENMAN C.J.—This point is decided by *Ex parte Fallon*, which has not been quoted in the late cases. In the annuity act it is "within twenty days of the execution," in this act it is, "twenty one days *after*," and I do not see

(a) 8 A. & E. 577; S. C. 3 N. & P. 553.

(b) 5 T. R. 283.

any difference between “*of*” and “*after*.” That case being in point we should not be justified in encouraging doubt where it is so desirable to have a certain rule.

1840.

WILLIAMS  
v.  
BURGESS.

LITTLEDALE J.—The wording in some of the acts relative to the computation of time is certainly very different, and may lead to questions, but the words in the annuity act, which were construed in *Ex parte Fallon* are much the same as in the act before us: *Buller J.* there relies upon 2 Inst. 674, on the stat. 27 H. 8, c. 16, where the words are “within six months after *the date*,” and Lord Coke said, “After the date and after the day of the date, upon this act, is all one, so as the date itself be taken exclusive.”

WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

CULVERSON v. MELTON.

Saturday,  
November 21st.

**TRESPASS** for entering the plaintiff's apartments and taking his goods.

Plea: not guilty by statute.

At the trial before *Parke B.*, at the York spring assizes, 1839, it appeared that the defendant had committed the trespass in question, in levying execution of a judgment of the Hull Court of Requests (*a*). The plaintiff, who was a

By the Hull Court of Requests' Act, a summons for a debt may be served by leaving it at the dwelling-house of the debtor, with his servant or other person belonging to him, and if he does not appear, the creditor may proceed *ex parte* to judgment and execution.

(*a*) By 2 Geo. 3, c. 38, “An Act for the more easy and speedy Recovery of small Debts, within the Town and County of the Town of Kingston-upon-Hull,” it was enacted (sect. 5), that it should be lawful for any persons, to whom any debt of the value of 40s. (raised to 5*l.* by 48 Geo. 3, c. 109,

s. 8) should be owing “by or from any other person or persons whatsoever, inhabiting or residing within the said town of Kingston-upon-Hull, or the county of the same town, or using or frequenting the markets thereof, or usually buying or selling or seeking a livelihood therein, or sailing or navigating to

A summons was left with his wife at the house where the debtor,

who was a seafaring man, and absent on a voyage to the East Indies, had lived before his departure from England, and where the wife still lived.

*Held*, that the summons had been duly served, and that the creditor might proceed to execution.



1840.

~  
CULVERSON  
v.  
MELTON.

seafaring man, sailed for the East Indies in April, 1838. For some time before sailing from England, he and his wife had resided together in the apartments above mentioned. In October, 1839, a summons from the Hull Court of Requests was sued out against the plaintiff in respect of a claim for coals supplied to his wife at the apartments, partly during his residence and partly since his departure. The summons was sued out on the 13th October, and required the plaintiff to appear on the 18th, and was served on his wife at the same apartments, where she continued to reside. No one appearing for the plaintiff, in pursuance of the summons, judgment had passed against him, and in the following month, the plaintiff having been abroad throughout the proceedings, his goods were taken in execution. The only question was, whether there had been such service of the summons as to justify the execution. The learned judge being of opinion that, under the statutes regulating the proceedings of the Hull Court of Requests, the service was sufficient, directed a nonsuit.

A rule having been obtained for a new trial,

*Baines* and *R. Hildyard* shewed cause, and relied on the

and from the said port and haven of Kingston-upon-Hull aforesaid," to get a summons from the court, expressing the sum demanded, and requiring the debtor "to appear at a certain time and place, to be mentioned in such summons, before the commissioners of the said court, &c. and the serjeant of the said court shall forthwith cause such summons *to be served* on such debtor, either personally or by leaving the same at the dwelling-house, lodging, place of abode, shop, shed, stall, stand, or other place of dealing or trading of such debtor, being within the limits of

the said town or county, with his servant or other person belonging to him, &c. and that upon proof made that such summons hath been duly served," the commissioners were authorised to proceed to judgment.

By sect. 6, if a debtor, duly summoned as aforesaid, should not appear, the commissioners were authorised, after proof of service of the summons, to proceed to judgment *ex parte*. By sect. 8, the commissioners were authorised to issue execution against the goods or body of the debtor.

visions of the statutes with reference to Hull as a free town.

1840.

CULVERSON  
v.  
MELTON.

*All* contra, contended that there was nothing in the case to shew that absentees were liable to be proceeded against and that, as the statutes made service at the dwelling-house efficient, it must at least be understood to be the dwelling-house of the debtor, and that the proceeding against a party without notice was abhorrent to the general principle and could not be sanctioned, unless by the most express language of the legislature. He cited *Williams v. Ingham* (a), *Rex v. Benn* (b), *Harper v. Carr* (c), *Painter v. Liverpool Gas Company* (d).

The COURT (e), dubitante *Williams J.*, were of opinion that the writ against the plaintiff had been "duly" served, within the special provisions of the statute.

Rule discharged.

& C. 772; S. C. 5 D. (d) 3 A. & E. 433; S. C. 6 N. & M. 736.

R. 198. (e) Lord Denman C. J., *Little-  
R. 275. dale, Williams and Coleridge Js.*

FISHER and another v. LEE.

Wednesday,  
November 4th.

DEBIT for money had and received. Plea: non est.

At trial before *Coltman J.* at the York summer assizes, 1840, it appeared that the action was brought to recover an alleged excess of toll, taken by the defendant as collector of tolls on the river Ouze. By 7 Geo. 3, c. 96, "An Act for making navigable the river Ouze from below Wid-

Under an act for making navigable the river Ouze, a toll of 4d. was imposed on every ton of coals, cinders, lime and limestone, stone, gravel and manure, car-

ried by the river, and for every ton of butter, or other goods, wares and merchandize a toll of 9d.

That blocks of stone, cut to a certain size and shape for railway sleepers, were not within the description of things subject to the higher toll.

1342.  
 ~~~~~  
 F11222  
 v.  
 L11

dington lags, at or near Linton, to the junction of the rivers Swale and Ure; and for making navigable the river Swale from the said junction to Morton Bridge, and also the brook running from Bedale into the river Swale in the county of York," "for every ton of coals, cinders, lime and limestone, stone, gravel, and manure carried upon the said river," &c. a toll of 4d. was imposed, and "for every ton of butter or other goods, wares, and merchandises and commodities, carried and conveyed upon the said river," &c. a toll of 9d. The higher toll had been taken from the plaintiffs for certain blocks of stone which had been cut to a certain size and shape for railway sleepers. The plaintiff had obtained a verdict, under the direction of the learned judge, that these stones were not "goods, wares, merchandises or commodities," so as to be subject to the higher duty, and leave was given to the defendant to move to enter a nonsuit.

*Starkie* having moved accordingly,

PER CURIAM (a)

Rule refused.

(a) Lord Denman C. J., *Littledale, Williams and Coleridge* Js.

### DONSLEY v. VARLEY.

Tuesday,  
 Nov 24th.

*W.*, as agent for the defendant, had occasionally employed *B.* to

ASSUMPSIT for goods sold and delivered, goods bargained and sold, with a count upon an account stated.  
 Plea: the general issue.

purchase wools, which purchases had been ratified by defendant. In June, 1839, defendant wrote to *B.* to say he would have nothing to do with any purchases made by him. This letter, it appeared, had been communicated to the plaintiff, but at what time was left uncertain. In July, *B.* bought wools of plaintiff, then lying at his premises, and they were sent to a warehouse of another person, where they were weighed and packed by *B.* (together with other wools) in sheets, which defendant was in the habit of sending there for the purpose of packing such wools. The wools in question were not paid for, and it was the course of dealing that wools were not to be removed from such warehouse till payment. In an action to recover the price of the wools,

*Held*, 1. That there was sufficient evidence to warrant the jury in finding that *B.* was the defendant's agent for the purchase, and that the plaintiff had not had notice of the countermand of his authority. 2. That there was a sufficient acceptance of the wool on behalf of the defendant within the Statute of Frauds.

trial before *Littledale J.*, at the last summer assizes at Nottingham, it appeared that the action was brought to recover the value of certain wool, purchased from the plaintiff by the defendant, through the agency of one *Bamford*, in the month of July, 1839. In order to establish the agency of *Bamford*, it was proved that the defendant was in the habit of sending his son and one *Wilson* to different persons to purchase wool, and that they had occasionally sent *Bamford* to purchase of certain persons at fixed prices, and there was evidence to shew that the defendant ratified the contracts so made by *Bamford*. On the 28th June (prior to the sale in question) the defendant wrote the following letter to *Bamford* :—

—I am informed you are buying for my account. I please observe I will have nothing to do with it, as I have ceased buying wools for some time.


Yours, *Jas. Varley.*"

It appeared that this letter had been communicated to the plaintiff, but at what time was left uncertain. The wool in question was bought while on the plaintiff's premises, the price was agreed upon, but it was not weighed there: it was sent to the warehouse of a third party, where the wools purchased by *Bamford* for the defendant were deposited, and it was there weighed by *Bamford*, and packed in sheeting which the defendant was in the habit of sending there for the packing of such wools. The wool, however, was not paid for, and it was the usual course of business that the wools should be left at this warehouse till

contended on the part of the defendant, first, that there was no evidence of *Bamford* being the defendant's agent; secondly, if there were, that the agency had been terminated by the letter of the 28th June, before the time of the sale; and, thirdly, that there had been no sufficient delivery of the wool by the defendant within the Statute of 1825. The two first points were left to the jury, and on the third his lordship stated his opinion against the

1840

DOUSLEY  
v.  
VARLEY.

1840.  
  
 DODSLEY  
 v.  
 VARLEY.

defendant. The plaintiff recovered a verdict, leave being reserved to the defendant to move to enter a nonsuit.

*M. D. Hill*, on a former day in this term (*a*), moved for a rule nisi accordingly, and insisted on the objections taken at the trial. On the first and second points he cited *Neal v. Irving* (*b*) and *Haughton v. Ewbank* (*c*); and upon the third point, *Baldey v. Parker* (*d*), *Smith v. Sarman* (*e*), and *Maberley v. Sheppard* (*f*).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—In this case, which was moved on three grounds for a nonsuit, we have examined our brother *Littledale's* notes, and are of opinion there should be no rule.

The first and second grounds were, that there was no proof of agency in *Bamford*, by whom the wools, the subject-matter of the action, were bought, or, if there were, that such agency had been countermanded before the contract was completed so as to satisfy the Statute of Frauds. Upon both these points there was evidence for the jury. As to the first, the evidence raises a strong impression that the defendant well knew that *Bamford* was employed on many occasions to buy for him, and had ratified his contracts, and we think the jury did right in finding that he was the agent of the defendant in making the contract in question. This point established, the onus was shifted, and, to make out the countermand, a letter was read, written by defendant to *Bamford*. This by itself would be nothing, unless communicated to the plaintiff before the contract was completed by delivery and acceptance. Now the time when the communication was made was left in uncertainty. It is clear

(*a*) Nov. 5th, before Lord Denman C. J., *Littledale, Williams and Coleridge Js.*

(*b*) 1 Esp. N. P. Ca. 61.

(*c*) 4 Campb. 88.

(*d*) 2 B. & C. 37; S. C. 3 D. & R. 220.

(*e*) 9 B. & C. 561; S. C. 4 M. & R. 455.

(*f*) 10 Bing. 99; S. C. 3 Mo. & Scott, 436.

plaintiff had established the agency, there could not, unless the countermand in due time were unquestionably as to leave no question for the jury, there was any doubt it was for them, and the most the defendant could be entitled to on this point was a new trial. But the learned judge is entirely satisfied with the finding of the jury; this second point fails.

It was contended, thirdly, that there was no contract by delivery and acceptance so as to satisfy the Statute of Frauds. The facts were, that the wool was left at the plaintiff's, the price was agreed on, but it was to be weighed; it was then removed to the warehouse of a third person, where *Bamford* collected the wool which he purchased for defendant from various places, and to which place the defendant sent sheeting for weighing up of such wools. There it was weighed together with the other wools, and packed, but it was not paid for as is the usual course for the wool to remain at this place until paid for. No wish was expressed to take the finding of the jury on the fact of agency, defendant's counsel relying in that of the judge, provided the circumstances would amount to it in point of law. We agree with the judge: therefore all these must be taken to be in favour of the defendant. Then he has removed the plaintiff's wool to a place of deposit for his own wools—he has mixed it with his other purchases of wool—he has packed it in his own sheeting—every thing is complete but the payment of the price. It was argued that, because by the custom of dealing he was not to remove the wool to a distant place for payment of the price, the property had not passed to him, or that the plaintiff retained such a lien on the wool as was inconsistent with the notion of an actual delivery. But that, upon this evidence, the place to which the wool was removed must be considered as the defendant's warehouse, and that he was in actual possession of it there, and that it was weighed and packed; that it was thence-

1840.

*DODSLEY*  
v.  
*VARLEY.*

1840.

**DODSLEY**  
v.  
**VARLEY.**

forward at his risk, and if burnt must have been paid for by him. Consistently with this, however, the plaintiff, had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes but improperly called a lien, growing out of his original ownership, independent of the actual possession and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to and actual receipt by him. This, we think, is the proper conclusion upon the present evidence, and there must be no rule.

*A.*

Rule refused.

## END OF MICHAELMAS TERM.

## SITTINGS AFTER MICHAELMAS TERM.

## BURDER v. VELEY and JOSLIN.


The churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed at a vestry meeting duly convened, and has been refused by a majority of the parishioners there assembled, have no

**PROHIBITION.** The declaration stated that the now defendants, on the 10th June, 1837, being then the churchwardens of the parish of Braintree, in the county of Essex and diocese of London, made a certain pretended rate and assessment upon certain inhabitants of the said parish, as and for a church rate assessed upon and payable by the inhabitants of the said parish, which pretended rate was and is in the words and figures stated and set forth in the paper writing thereafter in that behalf mentioned and referred to. That on the 26th of August, in the year afore-

power of their own sole authority, at a subsequent time, to make such a rate.

If a rate be so made by the churchwardens alone, and a libel in the ecclesiastical court to enforce its payment by a parishioner is admitted to proof, a prohibition will be awarded.

Judgment affirmed, in error, by the Exchequer Chamber.

1840.  
  
 BURDER  
 v.  
 VELEY.

And, the now defendants caused and procured a certain process called a citation to be issued against the now plaintiff, purporting therein that the Lord Bishop of London thereby authorised, empowered, enjoined and commanded all and singular clerks and literate persons, whomever and wheresoever, in and throughout the whole diocese of London, peremptorily to cite the plaintiff, or cause him to be cited, to appear personally, or by his proctor duly constituted, before *Stephen Lushington*, then being vicar general and official principal of the Episcopal and Consistorial Court of London, lawfully constituted his surrogate, or some other competent judge in that behalf, in the common hall of Doctors' Commons, and place of judicature there, on the sixth day after service of that process, if it should be a general session, by-day, or additional court day of the said Court, otherwise on the general session by-day or additional court day of the said Court then next following, then and there to answer the now defendants (therein described as the churchwardens of the said parish) in a certain cause of subtraction of church rate. That in pursuance of and in obedience to the said process, the now plaintiff duly appeared in the said Consistorial and Episcopal Court, whereupon the proctor for the defendants, and such churchwardens as aforesaid, prayed the said *Stephen Lushington*, then being the official principal of the same Court, to admit to proof a certain libel, containing, amongst other things, certain allegations and propositions by way of complaint against him (plaintiff), viz.:

That the parish church of the said parish being in need of several necessary repairs, the same not having been substantially or sufficiently repaired for several years then past, the churchwardens, overseers of the poor, and divers others of the most substantial parishioners and inhabitants of the said parish, on the 2d of June, in the year 1837, did meet together in vestry in the vestry room of the said parish, pursuant to public notice previously and duly given, for the purpose of making and granting a rate for the repairs of the church



1840.

BURDER  
v.  
VELEY.

of the said parish, and for defraying the expenses incident to the office of the churchwardens thereof for the remainder of their year of office, and that at such meeting the Rev. *Bernard Scale*, clerk, the vicar of the said parish, was present and took the chair, and further alleging, that defendants did produce and exhibit to the said meeting a survey and estimate, which had then been recently made by a person of competent skill and experience, of the repairs necessary to be immediately done to the said parish church, and of the expenses thereof, and that such expenses were computed to amount to the sum of 508*l.* 12*s.*; and that they did also produce and exhibit to the said meeting an estimate of the necessary and lawful expenses incident to the execution of their said office, amounting to the sum of 23*l.* 18*s.*; that they stated to the said meeting that the said sums, amounting together to the sum of 532*l.* 10*s.*, were absolutely and indispensably requisite for the necessary repairs and service of the said parish church. That the necessity for such repairs was not disputed or denied by any of the persons present at the said meeting, and that no objection was made by any of such persons to the amount of such estimates. That it was then proposed and seconded, that a rate of 3*s.* in the pound should be granted and made, in order to raise the said sum of 532*l.* 10*s.*, but that before the same was put to the vote an amendment was moved and seconded, stating that little more than six months had elapsed since the parishioners of the said parish in vestry assembled had resolved, by a very large majority, that the consideration of a church rate should be adjourned for twelve months, and that in assembling the parish again to agitate the question of a church rate, and in doing so before the expiration of the time to which the consideration of this question had been postponed by the said resolution of the vestry (meaning thereby a vestry meeting which had been held in the month of December preceding), the said churchwardens had shewn themselves to be greatly wanting in that respect to the parishioners as a body, which was due

1840.

**BURDER  
v.  
VELEY.**

from every parochial officer, and that the meeting but deeply regret that the clergyman of the said could have given his sanction to a proceeding at frivolous and vexatious as that which then called a general assembly of rate-payers from their several parishes, and that thus conveying to the vicar of the said parish and to its churchwardens, the expression of their approbation for the then uncalled for and improper of the said parish, the meeting would give to the effect of the said churchwardens no other answer than that which they had already within six months received, and which would be found on the minutes of the vestry, that the vicar, as chairman, in the following words:—  
Resolved, that it appears to this meeting, that the existing law authorises churchwardens to convene a parish meeting for the purpose of levying a church rate, does also not authorise what is called the voluntary principle to this extent: that by it no church rate can be laid but by the free consent of a majority of the parishioners, duly assembled to determine upon it; that the parishioners of the said parish are fully prepared to vindicate this redeeming principle of the law, as it now stands, by freely exercising the rights that that law secures to them, and determining for themselves, whether a church rate shall now be laid or not; and that accordingly well considered the proposition to levy a church rate on the present occasion, and the principles involved in that proposition, it is their matured conclusion, so long as the parochial churches are exclusively for the use of the established sect, all expenses of the same should be defrayed out of the ample revenues of the said endowed sect, or, if there should not be ecclesiastical funds available for such purposes, that all expenses of the same should be defrayed by the voluntary contributions of those who exclusively enjoy the use of the buildings, and that, consequently, that the consideration of a church rate be deferred to this day twelvemonth." That a shew of cause was thereupon taken upon the said amendment,

1840.  
~~~~~  
BORDER  
v.  
VILEY.


and the said amendment was declared by the chairman to have been carried, but that a poll having been demanded by the defendants and duly taken, the said *Bernard Scale*, as such chairman, at the final close of the poll, on the 6th day of June in the year aforesaid, declared the number of votes to be 207 for the said amendment and 70 against it, and that he thereupon declared the said amendment carried. That the parishioners and inhabitants, rate payers of the said parish, in vestry assembled, had by carrying such amendment, refused to make or grant a rate for the purposes aforesaid, and that in consequence of such refusal, defendants did, on the 10th of June last, rate and tax the inhabitants and parishioners of the said parish, for and towards the necessary repairs of the said church, and the other expences necessarily and legally incident to the office of the churchwardens of the said parish, for the remainder of their year of office, at the rate of 3s. in the pound, on the annual value of all messuages, lands, and tenements, occupied within the said parish, in order to raise the sum of 488l. 10s. 4d. in part of the estimated amount of the repairs of the said parish church, and the other expences incident to the office of churchwardens of the said parish for the remainder of their year of office. That the plaintiff, at the time of making the said rate (thereby meaning the said pretended rate), did live and reside in and was an inhabitant, and did occupy a certain messuage and farm, in the said parish, of the actual yearly rent or value of 235l., but which was rated at 156l. 17s. 6d. only, and did also hold a certain other messuage in the said parish of the yearly rent of 148l., but which was rated at 95l. 17s. 6d. only, and that plaintiff was assessed in said rate (meaning the said pretended rate) in respect of his said messuages, &c. at the sums of 23l. 10s. 7d. and 14l. 7s. 7d. making together 37l. 18s. 2d. That the said rate was confirmed and allowed by the said vicar general and official principal or his lawful surrogate. That the defendants, at the time of the making the said rate (meaning the said pretended rate) and of the propounding

el, were the churchwardens of the said parish,  
y elected, chosen or appointed, and had made  
ed the proper declaration, and been duly  
the said office for the year 1837. That the  
23*l.* 10*s.* 7*d.* and 14*l.* 7*s.* 7*d.* making together  
were then due to defendants. That plaintiff  
eral times requested to pay said sums of 23*l.*  
14*l.* 7*s.* 7*d.*, making together the sum of 37*l.*  
defendants, and that plaintiff had refused or  
pay the same. That plaintiff, at the time of  
of said libel, had been and was of the said  
hat thereby he had been and was subject to  
on of the said Consistorial and Episcopal Court.  
ration then set forth the formal termination of  
th the prayer of judgment and the exhibits  
he libel, being a copy of the entry of the pro-  
he vestry on the 2d, 5th, and 6th of June before  
and the following copy of the rate itself;—

“ Braintree, 10th June, 1837.

at a vestry or meeting of the inhabitants in  
d for the parish of Braintree, in the county of  
iocese of London, holden in the vestry room  
ourned to the parish church of the said parish,  
ie 2nd day of June, 1837, and by adjournment  
the 5th and Tuesday the 6th days of the same  
rsuance of a notice duly given, according to the  
statute in that behalf, for the special purpose  
at is to say), for the purpose of making and  
ate for the repairs of the church of the said  
for defraying the expences incident to the  
churchwardens thereof for the remainder of  
f office, the inhabitants of the said parish, in  
assembled, did refuse to make or grant a rate  
oses aforesaid, or either of them, by postponing  
ration thereof for twelve months, now we the  
*Augustus Charles Veley* and *Thomas Joslin*,  
ens of the parish of Braintree aforesaid, in vestry

1840.

  
BURDER  
v.  
VELEY.

1840.

BURDER

v.

VELEY.

assembled, do hereby, this 10th day of June, 1837, rate and tax all and every the inhabitants and parishioners of the parish aforesaid hereunder mentioned, for and towards the necessary repairs of the church of the said parish, and the other expences necessarily and legally incident to the office of the churchwardens of the same parish for the remainder of their year of office, the several sums of money hereunder mentioned, being a rate or assessment of 3s. in the pound on the annual value of all messuages, lands, and tenements occupied within the said parish.”—(Then followed an extract from that part of the rate which had reference to the plaintiff;—the confirmation of the rate by the surrogate;—and a certificate, signed by the vicar and several other parishioners, that the rate in question was necessary for legal purposes and was in their belief fairly made.)

And plaintiff further says, that the same rate was and is a rate made, and attempted to be imposed and enforced, without any competent authority in that behalf, and was and is altogether void, and that the said Consistorial and Episcopal Court had not nor has any jurisdiction over the said pretended rate, or any power or authority whatsoever to admit the said libel to proof, or to proceed to enforce the payment of the said pretended rate. Plaintiff further says, that upon the now defendants so praying that the said libel might be admitted to proof, the proctor of the plaintiff, by his learned counsel in that behalf, opposed the admitting the said libel to proof, urging and insisting, among other things, that the said pretended rate of 3s. in the pound was a rate made and attempted to be imposed and enforced without any lawful or competent authority in that behalf, and that the said Consistorial and Episcopal Court had not any jurisdiction over the said pretended rate, or any power or authority to admit the said libel to proof or to enforce the payment of the said pretended rate, yet the said *Stephen Lushington*, so being &c. afterwards, to wit, on &c., admitted the said libel to proof, and as well the defendants as said *Stephen Lushington*, as such

eral &c. have since proceeded and still are pro-  
n the said cause of subtraction of church rate &c.  
g with verification and prayer that the writ of  
n might issue.

l demurrer and joinder.

se was argued in the Queen's Bench in Trinity  
9(a), by *Turner* in support of the demurrer, and  
*mpbell* A. G. contra (b).

1840.  
BURDER  
v.  
VELEY.

urt took time to consider; and in Easter term,  
y 1), the following judgment was delivered by  
DENMAN C. J.—This case came before us on a  
to a declaration in prohibition, directed to the  
the Consistory Court of the Bishop of London,  
him to proceed no further against the plaintiff  
covery of a supposed church rate, laid on the pa-  
of Braintree by the churchwardens alone, not-  
ing the vote of a vestry by which the rate was  
The Consistory Court decided against this de-  
ularly pleaded, and has thereby raised the ques-  
her the churchwardens have power to impose a  
te against the declared will of the inhabitants in  
embled.

iting this question at the bar, the ancient doctrine,  
e custom of England the inhabitants are bound to

1st and June 5th, be-  
nman C.J., *Littledale*,  
d *Williams* Js.

rguments and autho-  
are omitted here, as  
e same as those in the  
Chamber (*post*, 475),  
ception of one point,  
not urged in the court  
.—*Turner* contended  
supposing prohibition  
to the ecclesiastical  
matter concerning a  
the present cause

was not ripe for the interference  
of the temporal courts, as to which  
were cited *Chesterton v. Farlar*,  
7 A. & E. 713; S. C. 2 N. & P.  
15; S. C. in the ecclesiastical  
courts, 1 Curt. Rep. 345, 367, 371;  
*Byerley v. Windus*, 5 B. & C. 1;  
S. C. 7 D. & R. 564; *Hall v.*  
*Maule*, 7 A. & E. 721; 3 N. & P.  
459: and *The Attorney-General*  
cited Bull. N. P. 218; *Cockburn v.*  
*Harvey*, 2 B. & Ad. 797; *Ricketts*  
*v. Bodenham*, 4 A. & E. 433; 6 N.  
& M. 170.

1840.

BURDER  
v.  
VELEY.

repair the body of the church and to inclose the churchyard was not disputed, a doctrine fully stated by *Holt C.J.*, as quoted by the Queen's advocate in arguing the present case in the Consistory Court. "By the civil and canon law the parson is obliged to repair the whole church, and so it is in all christian kingdoms but in England, for it is by the peculiar law of this nation that the parishioners are charged with the repairs of the body of the church (a)." This is undoubtedly a legal truth, as old as any in our books. Lord *Coke*, in his commentary on the statute, or writ of *circumspectè agatis* (2 Inst. 489,) and that on the *articuli cleri* (Ib. 653 (b)), and in numerous other places, distinctly lays it down, and all the authorities are the same way; and, though the period of the earliest church rate does not appear to be ascertained, we may safely assume that the expence required for this purpose was always defrayed by means of a rate levied on the parishioners. Neither was that proposition denied on the part of the plaintiff, or that a church-rate is a matter of ecclesiastical cognizance, or that the churchwardens are entrusted with the expenditure of the rate so levied, and liable to spiritual censures for neglect of their duties thereon.


But the question is, whether, in case of refusal by the parishioners, the churchwardens are empowered to impose a rate for that purpose, and indeed compellable by spiritual censures so to tax their fellow parishioners. If they have not this power, and are not subject to this liability, the defendants argue that there would be a wrong without a remedy, a striking argument, no doubt, as that is an anomaly abhorrent to the law of England. The wrong is neglect of duty by parishioners; the remedy is supposed to be found in the power of their officers to tax them. But the history of antient times establishes that the law did apply a remedy such as was found then, and was expected always to continue amply sufficient to secure the reparation of churches,

(a) See *Hawkins v. Rous*, Carth. 360.

(b) Perhaps the passage beginning "By the canon law," &c.

the proceeding by interdict, which suspended the performance of ecclesiastical rites in the refractory parish, or the proceeding by excommunication against every parishioner. Either of these two penalties was too awful in itself, and in the suffering of those who incurred it, to fail of immediately producing the desired effect, or more probably, the denunciation was alone equal to its purpose, and the mischief may never have existed in the earliest times. Perhaps also, the force and efficacy of the remedy may account for the want of parliamentary provision, which could only have rested on the weaker sanctions of temporal power. The alterations of men's opinions and feelings upon these subjects having deprived the old remedy of its virtue, we are to inquire whether the law has provided that other remedy which is now sought to be enforced. If not, extreme injustice towards the churchwardens is said to result, as they are confessedly bound to repair the church, and yet are provided with no means of performing that duty.

This argument would also be entitled to the greatest consideration, if the law subjected churchwardens to any personal inconvenience, as a consequence of the church remaining unrepaired, when destitute of the funds requisite for upholding the fabric, or supplying any of its wants, to which a church rate is applicable. If, in such a state of things, they could be sued for injury done to a passenger on the highway by the decayed church wall coming down upon him, or indicted for a nuisance by its fall there, as has been surmised; if they could be punished for not laying out their own money in repairs, that law, if it also prohibited them from obtaining full indemnity from those whom at the same time it pronounces to be primarily liable, would be chargeable with manifest inconsistency and injustice. Such liabilities indeed, if recognized by general usage, or even by a prevailing practice for them to make advances to that end, would tempt us to imply from the custom of England, which charges the inhabitants with repair of churches, a power in the churchwardens to re-

1840.  
  
 BURDER  
 v.  
 VELEY.



1840.

BURDER  
v.  
VELEY.

imburse themselves from their neighbours' funds, even though that power had never been exercised. But no instance has been found of a churchwarden being thus visited : on the contrary, numerous authorities in our reports establish the proposition, that churchwardens can only be liable in respect of monies come to their hands ; and all that appears in the books of ecclesiastical law, with reference to the duties of those officers, is qualified by the supposition that the parish has furnished them with adequate resources. Nor have churchwardens been in the habit of making such advances.

The plaintiff in this present suit has the right to cast the burden of proof on his adversaries. The law requires clear demonstration that a tax is lawfully imposed. No act of parliament vests in the parish officers such a power as these have exercised, nor recites that such a power exists by common law, or custom. No book of reports affirms it; no such usage in fact prevails in the land. An opposite usage prevails ; the church rate is constantly imposed by the inhabitants in vestry assembled. In *Gibson's Codex*, 220 (a), it is said, " rates for reparation of the church are to be made by the churchwardens together with the parishioners assembled, upon public notice given in the church ; and the major part of them that appear shall bind the parish, or, if none appear, the churchwardens alone may make the rate, because they, and not the parishioners, are to be cited and punished in defect of repairs." Such is the form of the rate in all the books of practice. The assertion, that no necessity has ever arisen for resorting to the power, because the consent of a majority of the vestry has never been wanting, is not merely gratuitous, it is incredible. During so many ages, that it never once should have happened that churchwardens have wished to impose a church rate when the majority of parishioners have wished otherwise, is a supposition that has no foundation, but in fancy. The doctrine here laid down has received the sanction of the highest authorities in Westmin-

(a) Vol. i. p. 196 (2d ed.).

ster Hall. C. J. North lays it down in *Rogers v. Davenant* (a), that "the Spiritual Court may excommunicate every inhabitant if the church is left unrepaired, but yet can impose no tax." Let it be supposed (however improbable) that during those vehement contests in the time of Charles the Second, when the parishioners' refusal to raise a rate induced some of the bishops to appoint commissioners for that purpose, the churchwardens, in every instance, took part with the parish in their refusal, if the churchwardens were amenable to the Spiritual Court for the non-repair of churches, and at the same time enjoyed the power of taxing the parish for the expense, nothing could have been more simple, direct and complete than the ordinary's method of proceeding; he would have ordered the churchwardens to execute the needful repairs; they, if competent, would have imposed the rate, or, refusing, would have been excommunicated for disobedience of his lawful commands. But, instead of taking a course so entirely free from objection, according to the law now contended for, the bishops created a new and unheard-of species of authority under the name of commissioners to levy this rate, for the non-performance of a duty which it is now contended they might have enforced with perfect ease. If the mere necessity for doing an act could create a machinery for performing it, those commissions would have been lawful, for they would have obtained the object. But the attempt was pronounced unlawful, and abandoned. There was no need of making it, if the power now asserted were vested in the churchwardens, for that would have been equally effectual for its purpose, and the scandal of an unconstitutional incroachment would have been avoided. At that period, as well as at the great era of the reformation, the subject underwent frequent discussion; yet this power is not asserted by any learned text writer even on the ecclesiastical law. The cases cited on the argument were numerous; we have since carefully examined them all, but have found them, for the

1840.

BURDER  
v.  
VELEY.

(a) 1 Mod. 194.

1840.

BURDER  
v.  
VELEY.


most part, to bear very imperfectly on the present question. We do not feel it necessary to add any comments upon them to the answer which they received at the bar, with one or two exceptions. An anonymous case is reported in 1 Mod. 79, "Moved for a prohibition to the Spiritual Court, for that they sue a parish for not paying a rate made by the churchwardens only, whereas by the law the major part of the parish must join. *T'wisden J.* Perhaps no more of the parish will come together. *Counsel.* If that did appear it might be something." This is the whole report; it is no decision, and not even a dictum; if it were either, it could not affect the argument here, for it could but be made to apply to a refusal of the parish to meet for considering of a rate, and we are dealing with the facts that they have met, and considered, and refused.

Another case, reported in the 1st edition of *Vent.* vol. i. p. 367, is also anonymous, but it is certainly not the same as that just cited, because that was in M. T. 22 *Charles 2.*, this in T. T., 35th year of the same reign. It is in a later edition of *Ventris*, named *Thursfield v. Jones*, and is in these terms: "A motion for a prohibition in a suit in the Ecclesiastical Court for a churchwarden's rate, suggesting that they had pleaded, that it was not made with the consent of the parishioners, and that the plea was refused. The Court said, that the churchwardens (if the parish were summoned and refused to meet or make a rate) shall make one alone for the repairs of the church, if needful, because that if the repairs were neglected the churchwardens were to be cited, and not the parishioners; and a day was given to shew cause why there should not go a prohibition." If this means no more than that where the parishioners being duly summoned refuse to meet, the churchwardens may act as the parish meeting, this appears perfectly reasonable and just. In such case the churchwardens form the vestry, and to them the absent leave the management of parish affairs, acquiescing in their resolutions, not resisting and objecting to them. But, if it is to be understood as a de-

claration, that, when the parishioners do attend and refuse to make the rate, the churchwardens may forthwith proceed to impose one, this would be a dictum standing alone: it was unnecessary for the judgment; it rests on no authority, it leads to no result in the particular case. It is such a remark as a reporter may have thought the judge adopted when, on an ex parte statement of the law by counsel, he only granted his application; or, if even it was actually uttered by the Court in granting a rule to shew cause, it is wholly insufficient for the erection of a new authority, inconsistent with the known practice. A further observation on this decision is, that the reason assigned for it is not correct, unless the churchwardens can be shewn to be personally liable, where they have no supplies, the contrary of which is true. Every search has been made among our records, and in the contemporary books of our officers for some further particulars of those two cases, but none can be found.

It was supposed in the argument that Lord *Stowell* had on one occasion laid down the law favourably for the defendants; *Maynard v. Brand* (a). But that short case when examined certainly bears no such import. It was an application for a monition to churchwardens to reinstate a fallen spire. The question was as to the form of the issue, whether it admitted the liability of the parish to reinstate. Lord *Stowell* thought it did, and directed the monition. "But," he added, "for the protection of the churchwardens, they should be informed that they must make their rate before they commence their repairs." It is clear that he had no idea of pointing out in what manner, or with whose concurrence, the rate was to be made.

There is, however, a case of *Gaudern v. Selby* (b), in the Court of Arches, where the very point now before us came in question, on appeal from the Consistory Court of Peter-

1840.  
  
 BURDER  
 v.  
 VELEY.

(a) 3 Phill. 501.

Appendix to the *Braintree Church-rate case*, p. 103, 109.

(b) 1 Curt. Ecc. Rep. 394; also reported by Mr. Johnson in the

1840.

~  
 BAKER  
 v.  
 VILLY.

borough, and Sir W. Wynne expressly decided that "the vestry being called together to make the amendment, and refusing to make it, the law is, that, if the parishioners will not make the rate, the churchwarden has a right to make it himself." This decision of an ecclesiastical judge, of admitted learning, caution and ability, requires the more consideration, because it is evidently the cause of our being engaged in the present inquiry. Dr. Lushington, the judge whose further proceeding we are desired to prohibit, spoke thus of Sir W. Wynne's judgment, the authority of which was pressed upon him. "I may observe upon that case that I believe its appearance was a surprise to the whole profession. It certainly was not known to the Ecclesiastical Commissioners, or at least not recollected by any member of that commission when the subject was there discussed; and during the thirty years that I have been in these courts I never knew that case adverted to, nor was I aware till lately that such a case was in existence, although it is of forty years standing(a)." And afterwards:—"There are many points in this case which I do not hesitate to say, if I was a co-ordinate judge, would be a little startling to my mind, the total absence of all authority having been stated on the one side or the other, the total absence of any precedent in the ecclesiastical Courts, all this would form a matter of the most weighty consideration in my mind, if I considered myself entitled to enter into the disposal of this case; but, be this as it may, this is a judgment deliberately pronounced by a dean of Arches Court, which is the superior Court to the one in which I am now sitting: the judgments of this Court are submitted to the dean of the Arches and may be overruled by him, and his decisions form that law which I am bound to administer. I consider then, according to the principles I have stated, the decision of *Gaudern v. Selby* (b) is a precedent binding on my judgment, and I am in obedience to that decision bound to admit this libel;

(a) *Braintree Church-rate case*,  
 by Johnson, 78.

(b) 1 Curt. Ecc. Rep. 94; Johnson, App. 103, 109.

that libel be good law or not, or what ought to law without the precedent in question, I do not self called upon to pronounce any opinion (a)."

At the hearing of the present case before Dr. *Lushington*, the learned judge interposing, pointed out many inaccuracies in the statement of facts in *Gaudern v. Selby* (b), that it teemed with eccentricity. It is tolerably true that it was that case alone which induced him to treat the present case as he did. Sitting in the Consistory Court he felt himself constrained by the decision of the Court of Arches, being a court of superior authority, to treat the present church rate legal and binding. An able report has been published since these remarks were reported that case, and containing a statement of facts which appears to remove much of the eccentricity pointed out by Dr. *Lushington*. But the great fundamental principle remains in its full force. However binding on the Consistory Court, and however respectable in itself, an isolated and recent decision by the Court of Arches is not binding in Westminster Hall.

The question on the effect of this single authority really is no more nor less than this: can the ecclesiastical law make a law? If he only declared one, the sources of law in this nation are equally open to us. If he drew his law from reasoning, we may examine it, and must give our opinion on its force. But, in truth, so important a doctrine was never promulged with so little conciliate the concurrence of others. The point was not discussed at all; neither reason nor authority is in its behalf. The proceeding wears the appearance of being *ex parte*, perhaps it had in truth become such by the withdrawal of opposition, which may be well explained by the smallness of the sum and the probable change of inhabitancy, or the exhaustion of all means and spirit of resistance by a litigation protracted for years. With all due respect to the venerable person from whom this judgment

1840.

BURDER  
v.  
VELEY.

*Free Church-rate case*,  
, 85.

(b) 1 Curt. Ecc. Rep. 394; Johnson, App. 103, 109.

1840.

BURDER  
v.  
VELEY.

ment proceeded, we are bound to declare that it does not appear to rest on principle, or to be admissible as authority. In the course of the argument in this place it was hinted that Lord *Stowell* entertained an opinion (a) favourable to a church rate like the present. He was supposed to have given advice, when at the bar, indicative of such views. From the great learning of that distinguished person, and his great familiarity with this peculiar branch of law, we thought his opinion at the bar might throw light upon the question, and perhaps irregularly availed ourselves of this chance of instruction. But we are bound to say, that, after perusing the case and his opinion with care, they convey to us a directly opposite notion of the impression of Lord *Stowell's* mind as to the validity of rates so imposed.

The conclusion at which we arrive is, that the Court Christian was wrong in overruling the defensive allegation of the parishioners that the rate was made against the wishes of the majority in vestry assembled, on the ground that this supposed church rate was a nullity, as having been made by persons who had no authority to make one in defiance of the declared dissent of the vestry; and that the Court decided erroneously in proceeding to give judgment for enforcing it.

But, even supposing the rate invalid, a second point was urged, that prohibition ought not to go from this Court to the Court Christian, the main reason being that the latter has exclusive jurisdiction over the subject-matter, which is said to be purely of ecclesiastical cognizance, and that appeal lies from the Consistory Court to the Court of Arches.

We are thus called on to state the principles of the proceeding by prohibition. There is no title in our law under which, if we look to the facts appearing in the several cases, more confusion and contradiction may be found. If we were, from these, bound to lay down a practical rule

(a) The case laid before Lord *Stowell*, and his opinion, are fully set out in the report of *Burder* and *Veley*, edited by Mr. *Arnold*, at pp. 12, n. (a), and 32, n. (w).

for arranging by classes where the writ ought to be refused, and where granted, the difficulties of the task might probably be found insurmountable. But the principle itself, however hard to apply, is clear. It is this:—that if any inferior Court will entertain a suit which appears by the libel in the outset, or is shewn on the face of the proceedings, to be beyond its jurisdiction, the Courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it. The case of *Home v. Earl Camden* (a) must always be resorted to for the learning on this head. That remarkable case gave birth to a controversy of full thirteen years duration, the commissioners of prize appeals, overruling a decision of Sir *J. Marriott* in the Court of Admiralty, had declared the capture of a Dutch vessel to have been made jointly by his majesty's land and sea forces, and had issued their monition to the receiver of the prize money to come in and account for it, with a view to dividing it accordingly. A prohibition was thereupon sued for in the Common Pleas, on the ground that the commissioners had misconstrued the act which regulated prizes made in the war with Holland. The debates that ensued in the several Courts are almost without a parallel. The points were argued in the Common Pleas three different times in three successive terms, by serjeants conspicuous for learning and talent. The Court, in a subsequent term, directed a fourth argument for removing some doubts which had arisen in their own minds, and, after taking two terms more for consideration, Lord *Loughborough* delivered the unanimous judgment of the Court, which was in favour of the prohibition, on the ground stated, and specifically because the construction of acts of parliament belongs to the temporal Courts. The matter was brought by writ of error to this Court, which gave its judgment immediately, on a single argument, for reversing that of the Common Pleas.

The leading observation that pervades the judgments

(a) In C. P. 1 H. Bl. 476; in K. B. 4 T. R. 382; in Dom. Proc. 2 H. Bl. 533, 6 Bro. Par. Ca. 203.

1840.

BURDER  
v.  
VELEY.



1840.

~~~~~  
 BULLER  
 v.  
 VILLET.

delivered by Lord *Kenyon*, and his brother judges, is, that the prize Courts have jurisdiction over the subject-matter of that suit, and consequently that their decision upon them must be final. *Buller* J. states this proposition in very general terms, and expressly declines the question whether the decision was right, as one placed beyond the sphere of his own inquiry. The principle on which the Common Pleas had adopted a different course, underwent very little consideration either from that able judge, or from the other members of the Court, the assumption of a conclusive right to determine questions brought before the inferior Court and within their jurisdiction being made by them all. The judgment of reversal was affirmed in the House of Lords under the advice of all the judges, expressed by Lord Chief Justice *Eyre*, but not sanctioning this doctrine; on the contrary, his lordship studiously avoided laying it down, and went into a lengthened argument on the construction of the prize acts, in order to shew that the lords of appeal had taken a right view of them.


This case and the entire subject were brought under the revision of this Court in *Gare v. Gapper* (a), and *Gould v. Gapper* (b), where a rule for prohibition, when moved for, was resisted, on the ground of conclusiveness in the judgment below, but the plaintiff was directed to declare on account of the great importance of the subject, and the necessity of having it most maturely considered. After it had been so considered and again and more fully argued, Lord *Ellenborough* delivered a long and elaborate judgment of the whole Court, which in overruling the demurrer to the plaintiff's declaration in prohibition expressly denied the doctrine, a judgment which bears as high a character of authority as the decision of any single Court in Westminster Hall can give. The general law was discussed when cause was shewn against the rule by barristers filling the first rank in their profession, and enjoying a high reputation for ability and learning: the conduct of the argument on demurrer was confided to two special pleaders of great

(a) 3 East, 472.

(b) 5 East, 345.

distinction, afterwards *Burrough* and *Dampier* Js.; the unanimous opinion of the Court was pronounced by Lord Ellenborough after all the reflection and preparation due to the great judges from whom he dissented; of those who concurred in it, one (*Grose* J.) had been an assenting member of the Court whose doctrine had been impugned, the other two (*Lawrence* and *Le Blanc*) had had their minds familiarised to the subject by argument on opposite sides at the Common Pleas. We are convinced that the case not only rests on authority which we could hardly be warranted in distrusting, but is founded in good reason, indeed that it flows from the principle of prohibition, which *Blackstone* (a) states to be the danger of a different decision of the same rights, and even of the same identical interests, by different Courts; "an impropriety, he observes, which no wise government can or ought to endure, and which therefore is a ground for prohibition."

There is ambiguity in the expression that the common law Courts have no *cognizance* of ecclesiastical matters; if it is meant that they have no knowledge of them, the assertion may be fairly questioned, matters of mere process and practice which may be in a great measure oral and traditionary are perhaps familiarly known only to the Court to which they belong; but, as to the principles of the ecclesiastical law, we have, in truth, the same means of knowledge, access to the same sources of instruction, and the same opportunities in all respects of forming a correct opinion. We are acknowledged on all hands to be bound to restrain their proceedings when they transgress their limits. We must then have organs for discerning where the limits are drawn. The same observation proves that in the other sense of the word *cognizance*, importing *jurisdiction*, the temporal Courts must possess it, for, though prohibition may not lie merely for mistake of fact, nor possibly for every mistake of law committed by an inferior Court having jurisdiction of the subject-matter, because it may be corrected on appeal, and we shall presume that

1840.  
  
 BURDER  
 v.  
 VELEY.

(a) See 3 Blac. Com. 112.

1840.

BURDER  
v.  
VELEY.

right will be done ; yet is it not, on the other hand, denied, that before sentence the Courts at Westminster have power to interfere for error involving the want of such jurisdiction, though not apparent on the proceedings, and that, if such be apparent, they may, and, if they may, they must prohibit, though repeated adjudications to the same effect have been made in the Courts below, and even after the solemn sentence of a spiritual Court of final appeal. A passage in *Fitzherbert*, N. B. 43, A, proves in a remarkable manner how little the proceedings of our Courts are considered to be dependent on what may take place by way of appeal in the spiritual Courts :—" If the king do recover his presentment unto a church, and hath a writ unto the bishop, &c. to remove the other incumbent, for which the incumbent sueth an appeal in the Archbishop's Court, &c. by reason whereof the archbishop sendeth a prohibition that he do not admit the king's clerk pendent the appeal, then the king shall have a writ directed to the archbishop and his officers to take off his inhibition, and that they do nothing nor suffer any thing to be done by others, in derogation of the crown, or of the king's right, and shall have another writ against the incumbent that he follow not such appeals, provocations, or other process or impediments, and also the king may have an attachment directed unto the sheriff against such incumbent if he go on then after such prohibition directed unto him."

*Buller J.* truly observes (a), that the cases reported to have occurred in the 17th century, under the head of prohibition, are not to be reconciled, nor all supported. He might perhaps have added, that scarcely one of them can be right, if the doctrine of refusing prohibition, where appeal lies, could prevail. He speaks with satisfaction of the settlement that this law has undergone of late, alluding, however, to no particular case where it was settled. It is singular, that in the work which bears his name, and which, whether his composition or not, has been always regarded as a valuable depository of general principles of law, it is laid

(a) In *Lord Camden v. Home*, 4 T. R. 382.

down that prohibition is granted *pro defectu jurisdictionis vel pro defectu triationis*, or proceeding in a manner *not warranted by law* (a); the precise ground on which this Court in *Gould v. Gapper* (b) disagreed with the learned judge's sentiments, as expressed in *Earl Camden v. Home* (c). But his dictum, at p. 397 (d), echoed still more strongly by Grose J. at p. 401 (d), "I am clearly of opinion that whether the court of appeal were right or wrong in their decree, it is not competent to us to form any opinion on the subject," would seem to have been founded on more recent cases. Now those quoted by him certainly fail to make out his proposition, and we are aware of no others. *Pierce v. Hopper* (e), where prohibition was granted without even an attempt to set up his general doctrine; *Howe v. Napier* (f), with Lord Mansfield's emphatic words, "Prohibition is *ex debito justitiæ*, if the Court of Admiralty proceed contrary to act of parliament." *Full v. Hutchins* (g) was also mentioned by Buller J., but it does no more than lay down the rule as it had been recognized in *Paxton v. Knight* (h) and numerous earlier cases, that after sentence prohibition is not to go for any defect not apparent on the face of the proceedings. Even this rule, however, furnishes an argument against refusing to the subject his right of application to the temporal courts to prohibit the spiritual courts from proceeding. For, suppose the party to apply for prohibition for a defect not thus apparent, and to receive for answer "the defect is undoubted, though not externally visible, but we cannot prohibit, because you may appeal, and we have confidence that the appeal court will see you redressed." Perhaps on hearing the appeal the superior spiritual court may agree with the inferior on a point of ecclesiastical law, and if it affirms the sentence, in a matter which this Court may have pronounced to be beyond their jurisdiction, the power to prohibit is lost, according to *Full v.*

1840.

BURDER  
v.  
VELEY.

(a) See Bull. N. P. 218.

(b) 5 East, 345, 365.

(c) 4 T. R. 382, 397.

(d) 4 T. R.

(e) 1 Str. 249.

(f) 4 Burr. 1944, 1950.

(g) 2 Cowp. 422.

(h) 1 Burr. 314.

1840.  
 ~~~~~  
 BORDEN  
 &  
 VALLEY.

*Hutchins* (a), because final sentence has passed, and there is no defect on the face of the proceedings, and I cannot refrain from observing in this place, that if prohibition had been moved for in *Gaudern v. Selby* (b), directed to the Consistory Court of Peterborough, and this very question of church rates had been brought before this Court, on shewing cause or on demurrer, as it is now, we cannot doubt that it must have decided against the validity of the rate, in favour of which no one authority could have been quoted, since the only authority which is now pressed upon us is Sir W. Wynne's judgment on the same case, brought before him on appeal instead of being brought here by prohibition.

The cases in *East* (c) then seem to establish, and consistency of reasoning requires, that the power of prohibition is in no case taken away by the privilege of appeal. If called upon, we are bound to issue our writ of prohibition, as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, although there may be a possibility of correcting it by appeal. For there is no reason for driving the subject to that expensive process, to abide the chance of a repetition of the error, which, if committed, can at last be only rectified by prohibition, and may be so committed as to be placed beyond even the reach of that remedy, or for compelling him to submit even to the direct inconveniences arising from that decision alone, if none lay beyond them. The question then remains, what are the defects that authorize and require us to issue the writ of prohibition? The answer is, that they are in every case of such a nature as to shew a want of jurisdiction to decide the case brought before them; *Gardner v. Booth* (d). In whatever stage that fact is made manifest to us, either by the crown or by any one of its subjects, we are bound to interpose. The misconstruction of an act is one of these

(a) 2 Cowp. 422.

and *Gould v. Gapper*, 5 East, 345.

(b) 1 Curt. Ecc. Rep. 394.

(d) 2 Salk. 548.

(c) *Gare v. Gapper*, 3 East, 472,

fects; the enforcement of a tax, imposed without lawful authority, is assuredly another, and such a tax we deem a church rate to be, which is laid by parish officers not only without the concurrence of the parish, but in defiance of their declared refusal to concur. This is no irregularity which may be waived or cured, leaving the principal matter substantially complete, though attended with unusual and informal circumstances, but it is a proceeding altogether invalid, and a church rate in nothing but the name.

Our judgment must therefore be given in favor of the plaintiff.

Judgment for the plaintiff (a).

PATTESON J.—I stated formerly (b) that I could not understand *Gare v. Gapper*. I think I do now understand it, and I should not only concur in it, but should adopt the views contained in it if the matter were *res integra*.

(a) See the next case.

(b) In *Blunt v. Harwood*, 3 N. & P. 582.

A.

### IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE QUEEN'S BENCH.)

VELEY and JOSLIN v. BURDER.

UPON the above judgment a writ of error was brought, which was argued in the sittings after Michaelmas term, 1840 (c).

Sir W. W. Follett for the plaintiffs in error. Two important questions are raised in this case: first, whether the rate in dispute is wholly illegal and invalid, presuming the courts of common law to have jurisdiction to inquire into that matter; and, secondly, whether these courts have jurisdiction to enter into such inquiry at all.

First, with regard to the validity of the rate. It is admitted upon the record that it was imposed for the purpose

(c) Nov. 30, Dec. 1 and 10, before Tindal C.J., Lord Abinger C.B., Parke B., Bosanquet J., Alderson B., Coltman J., Maule J. and Rolfe B.

1840.  
BURDER  
v.  
VELEY.

1840.

VELEY  
v.

BURDER.

of the necessary repairs of the church, and the propriety of the amount is not disputed. It is material to bear in mind the distinction between expenses that are strictly necessary, and those which are not so, though they may be applicable to the ordinary purposes of divine worship, such, for example, as the putting up bells or an organ: in the latter case, it is not disputed that the majority of the parishioners in vestry may bind the whole parish by a church rate; and, on the other hand, it may be admitted, that the consent of the majority is necessary to make a valid church rate for such purposes. But the question here is, whether the majority can refuse to provide for necessary expenses; or whether, in the event of their doing so, it is not competent to the churchwardens, and perhaps incumbent upon them, to raise the requisite funds by a rate. That the parishioners are under a legal obligation to repair the church is expressly laid down in the judgment of the Court below; that obligation is as ancient as the common law, and is recognized by the statute *circumspecte agatis* (a), and by Lord Coke in his commentary thereon (b). [Lord Abinger C. B. The statute 35 *Edw.* 1, stat. 2, also shews what the common law was at that time, and tends to prove that the parishioners were under a legal obligation to repair the body of the church.] The obligation is not denied on the other side, but it is contended that the only means of enforcing it prior to the Reformation was by excommunication or interdict, and that since that event these means have fallen into disuse. It is certainly not pointed out in the judgment below how the obligation is now to be enforced, though the assertions made on the other side as to the former method of doing so appear to be there adopted; but no authority is cited in support of the position; and it would have been a manifestly unjust proceeding, as confounding the guilty and innocent together. Church rate is avowedly a matter of ecclesiastical jurisdiction, and if there is any method of enforcing it, the common law courts will not interfere, they have refused to do so by mandamus: *Reg. v. St. Peter's*,

(a) 13 *Edw.* 1, st. 4.(b) 2 *Inst.* 489.

*rd (a), Rex v. Wilson (b).* The only instances, where a church rate has been granted in matters connected with a church rate, being where the churches had been erected by acts of parliament: *Rex v. St. Margaret's, Westminster*, *Rex v. St. James's, Clerkenwell*, and *Rex v. Croydon*, see a note to *Rex v. Wix (d)*.

the 25th sect. of 10 Ann. c. 11, (one of the churching acts), which came into discussion in *Rex v. St. Margaret's (c)*, it is enacted, that "the churchwardens of the parish church" may "assess, collect, and levy of the parson &c. for the repairs of the present church, all rates &c. as the churchwardens &c. might have done," if any division was made in the parishes. This, therefore, is a statutable recognition that the churchwardens had power of assessing a church rate.

On the other side rely on the usual form of a church rate, which states that it is made by the churchwardens and parson (e); but it is probable this is only the modern form, and that anciently the parishioners met for other purposes, such as to assist in ascertaining what parties had property in the parish, and thus that statement of assent became introduced in the rate itself. In all cases connected with parish rates the legislature has left the parishioners no control over the subject, as under the poor-law act, the highway act, and the churching act. It has been assumed that churchwardens are not liable to be proceeded against for not repairing a church, but that is not so; there is the *Shadwell* case, which was a civil proceeding before Lord Stowell in 1810 (f), and the case of *Maynard v. Brand (g)*, which was a criminal proceeding. It does not appear from either of these cases whether or not the churchwardens had any funds in

1840.



VELEY

v.

BURDER.

T. R. 364.

D. &amp; R. 602.

Mau. &amp; S. 250.

B. &amp; Ad. 199, 200.

(e) 1 Burn. Ec. L. Church, ix. 13.

(f) Sir W. W. Follett cited this from a MS. note by Dr. Arnold.

(g) 3 Phillim. 501.



1840.



VELEY  
v.  
BURDER.

hand, but it may be inferred they had not, and yet were liable to be proceeded against for not repairing the church.

All writers on ecclesiastical law are agreed that with respect to the necessary repairs, if the vestry refuse to make a rate, the churchwardens may do so: *Degge's Parson's Couns.* (a), *Watson's Clergyman's Law.* (b), *Wood's Inst. of the Laws of Eng.* (c), *Prideaux's Direct. to Churchwardens* (d), *Gibson's Codex* (e), *Vin. Abr. Churchwardens* (A. 2) (f), *Bac. Abr. Churchwardens* (C), *Burn's Eccl. Law, Church, sec. 6, (Repairs), §. 10* (g).

There are also several acts of parliament which impose a duty on churchwardens to provide certain things for divine worship at the expense of the parish, and this could only be done by a church-rate. The rule propounded has always been taken as the correct one by every writer of authority who has considered the question. It was so laid down by Archdeacon *Paley*, in his visitation charge to the clergy of the archdeaconry of Carlisle (h), and by the Ecclesiastical Commissioners, whose report was laid before parliament in 1832 (i); and lastly, there are the express decisions on the subject in *Thursfield v. Jones* (k) (which was cited in *Rex v. St. Peter's, Thetford* (l), without dissent), and *Gaudern v. Selby* (m).

The conclusion to be drawn from all these authorities is, that in regard to the actual repairs of the church or other matters essentially necessary to the celebration of divine worship, the churchwardens have the power to make and levy a rate, even though the majority of the vestry oppose

(a) Page 172, 3d edit.; 137, 4th edit.

(b) Chap. 39. Vol. ii. p. 722, 2d edit.

(c) Bk. 1, ch. 7, pp. 90, 91, 9th edit.

(d) Pages 40, 41, 42, ed. Tyr.

(e) Vol. i. tit. 9, ch. 4, s. 2, p. 190, 2d edit.

(f) Pl. 10, 12.

(g) Vol. i. p. 356, 8th ed. by Tyr.

(h) *Paley's Works*, vol. 7, p. 11.

(i) Pp. 120, 121, authenticated edit. *Longman*. Sir W. W. Follett also cited a MS. opinion by Sir W. Scott.

(k) 1 Vent. 367.

(l) 5 T. R. 364.

(m) 1 Curt. Eccl Rep. 394.

1840.

VELEY  
v.  
BURDER.

it, but that in other matters, such as the addition of a gallery or new ornaments, &c., which, though useful, are not necessary for divine worship, the consent of the vestry is requisite to the validity of a rate, but that even in that case the majority will bind the minority, and those who are absent. [*Alderson B.* The difficulty appears to be to account for the parishioners being called together, if when they dissent from the rate proposed by the churchwardens, the latter may still make the rate.] That difficulty is got over by the suggestion previously made, that the parishioners were not called together originally to decide upon the making the rate, but merely to ascertain the quantum which each parishioner should pay. [*Lord Abinger C. B.* It is, I believe, customary for the overseers to make the poor rate in vestry, though they are empowered by act of parliament to make it without the parishioners. *Alderson B.* In *Thursfield v. Jones (a)*, it appears that a rule nisi was granted for a prohibition, notwithstanding what fell from the Court as to the right of the churchwardens to make the rate; but that fact is not inconsistent with the opinion there mentioned, for it might be that the rule was granted because the plea in the Ecclesiastical Court did not sufficiently state the refusal of the parishioners.]

The cases which were relied upon in the argument below, by the other side, fail to establish the proposition contended for. *Pierce v. Prouse (b)* is reported in a variety of places, and all the reports differ from each other; the dictum that "the parishioners ought to assess the rate, and not the churchwardens," is only to be found in *Salkeld*; and it is plain that the real decision in the case was, that a rate for the repairs of the chancel as well as the nave could not be enforced. In *Rogers v. Davenport (c)*, *Wayte v.*

(a) 1 Vent. 367.

(b) 1 Salk. 165; S. C. nom. *Hawkins v. Rouse*, Carth. 360, Holt, 139, Vin. Abr. tit. Prohibition (H); S. C. *Anon.* Comb. 344; S. C. nom.

*Price v. Rouse*, 12 Mod. 83; S. C. nom. *Pense v. Prouse*, 1 Ld. Raym. 59; S. C. nom. *Hawkins's case*, 5 Mod. 390.

(c) 1 Mod. 194, 236; 2 Mod. 8.

1840.

VELEY  
v.  
BORDER.

*German* (a), and the case of *St. Mary, Bermondsey* (b), the question arose upon a rate to rebuild a church. The *Anonymous* case in 1 Mod. (c) is only a loose note and decides nothing. *Wheler v. Lambert* (d) is in favour of the plaintiffs in error. In *Dawson v. Wilkinson* (e) the question was as to the validity of a retrospective rate. No reliance can be placed upon the dicta in *Northwaite v. Bennett* (f), the two reports of which do not agree.

There are therefore, on the one hand, the opinions of various writers that a church rate like the present is valid, and, on the other hand, at least nothing sufficiently strong to induce the common law courts to overrule a solemn decision of the ecclesiastical court—the proper tribunal for such matters.

In the second place, however, inasmuch as church rate is, without question, a matter of ecclesiastical cognizance, the temporal courts will not interfere by prohibition, even though in their opinion the ecclesiastical court may have come to an erroneous conclusion on the subject. By the statute of *Circumspectè agatis* the exclusive jurisdiction over matters connected with the repairs of churches is given to the ecclesiastical courts. The only grounds on which the temporal courts will interfere by prohibition are, 1st, where the spiritual court has no original jurisdiction over the subject-matter; 2dly, where the spiritual court having jurisdiction, a matter incidentally arises of a temporal nature, as to which the ecclesiastical differs from the common law, as in questions of custom, prescription, modus, &c.; 3dly, where the spiritual court having jurisdiction, some matter arises which is triable at common law by a different rule from that of the ecclesiastical law, as in the circumstances of payment, release, the execution of a deed, &c.; 4thly, where the courts differ in the constructions of acts

(a) 2 Show. 141.

(b) 2 Mod. 222.


(c) Page 79, cited in the judgment in Q. B. *ante*, 464.

(d) 3 Keb. 533; S. C. Bac. Abr. Churchwardens, (A).

(e) Ca. t. Hardw. 381; Andr. 11.

(f) 2 C. &amp; M. 316; 4 Tyr. 236.

of parliament, as in *Home v. Camden* (a). The foregoing rules are to be deduced from various authorities; 3 *Blackst. Com.* 112; per Lord *Ellenborough* C. J. in *Gould v. Gapper* (b); 2 *Inst.* 601—618.

1840.  
  
 VELEY  
 v.  
 BURDER.

If the ecclesiastical court has come to an erroneous conclusion, in a matter within their exclusive jurisdiction, the only remedy is by appeal; *Griffin v. Ellis* (c). And even where the ecclesiastical court has no jurisdiction and has proceeded to sentence, these courts will not grant prohibition, unless the want of jurisdiction appears on the face of the proceedings; *Full v. Hutchins* (d), *Paxton v. Knight* (e). The other side will contend that the want of jurisdiction appears upon the proceedings in this case, inasmuch as a rate is set forth, which they will contend is upon the face of it a mere nullity; but the question is, whether or not the rate is valid, and that is purely a question of ecclesiastical law. Before 53 *Geo.* 3, c. 127, there was no power in any temporal court to interfere in matters of church rate; but that act by sect. 7 gives the power to magistrates to enforce the payment of church rate in certain cases, but expressly recognises and reserves the jurisdiction of the ecclesiastical courts. In cases concerning the validity of a marriage, if the parties are dissatisfied with the decision of the ecclesiastical tribunals, the course is always to appeal; as in *Sherwood v. Ray* (f). Prohibition is never granted where the matter is purely and solely of ecclesiastical cognisance: *Breedon v. Gill* (g), *Anon.* (h), *Starkey v. Barton* (i), *Chadron v. Harris* (k), *Buck v. Amcotts* (l), *Bridgeman's case* (m), *Copley's case* (n), *Guillan v. Gill* (o), *Juron v. Byron* (p),

- |                                     |  |
|-------------------------------------|--|
| (a) 1 H. Bl. 476; 4 T. R. 382; 290. | (i) Yelv. 172; Cro. Jac. 234;            |
| 2 H. Bl. 533; 6 Bro. P. C. 203.     | (S. C. nom. <i>Gore v. Stark</i> ), Noy, |
| (b) 5 East, 365, 366.               | (c) 3 P. & D. 398; S. C. 11 A. 129.      |
| (c) 3 P. & D. 398; S. C. 11 A. 129. | (k) Noy, 12.                             |
| & E. 743.                           | (l) Noy, 127.                            |
| (d) 2 Cowp. 422.                    | (m) Hob. 11.                             |
| (e) 1 Burr. 314.                    | (n) Hardr. 406.                          |
| (f) 1 Moo. P. C. Ca. 353.           | (o) 1 Lev. 164.                          |
| (g) 1 Ld. Ray. 219.                 | (p) 2 Lev. 64.                           |
| (h) Freem. Com. Law Rep. 289,       |  |

1840.

~~~~~  
 VELEY  
 v.  
 BURDER.

*Anon. (a), Symes v. Symes (b), Leman v. Goulty (c), Wilson v. M<sup>c</sup> Math (d), Rex v. Coleridge (e), Jeffrey's case (f), Paget v. Crumpton (g), Lee's case (h), per Buller J. in Camden v. Home (i), Hill v. Good (k), Chesterton v. Furlar (l), Ex parte Smyth (m).*

The judgment of the Queen's Bench is mainly founded upon the case of *Gould v. Gapper (n)*, but in that case there were questions concerning a modus, a parochial boundary, and the construction of an act of parliament, all of which are triable at common law. The rule adopted in that judgment from Sir *W. Blackstone (o)*, that the object of prohibition was to prevent conflicts between the spiritual and the temporal courts, can have no application to questions of church rate, as no conflict can arise on a subject which is clearly within the jurisdiction of the former courts. *Blunt v. Harwood (p)*, where the Court was disposed to grant a prohibition, turned upon the church-building acts, and no question was raised as to the jurisdiction of the Court to issue the prohibition.

Sir *J. Campbell* A. G. for the defendant in error. It is admitted on behalf of the defendant in error, that the adjournment of the consideration of the rate by the vestry was merely colourable, and that it amounted to a refusal to grant the rate; and that the church at the time of such refusal was in want of necessary repairs; but the question is not whether the parishioners have acted right in refusing the rate, but whether, having refused, the churchwardens could of their own authority impose one. It is not necessary to

(a) March. 92.  
 (b) 2 Burr. 813.  
 (c) 3 T. R. 3  
 (d) 3 B. & Ald. 241; S. C. 3  
 Phil. E. R. 61.  
 (e) 2 B. & Ald. 806; S. C. 1  
 Chit. Rep. 588.  
 (f) 5 Rep. 66, b.  
 (g) Cro. Eliz. 659.

(h) Vin. Abr. Prohib. (H.), 6.  
 (i) 4 T. R. 396.  
 (k) Vaugh. 302.  
 (l) 7 A. & E. 713; 2 N. & P. 15.  
 (m) 2 C., M. & R. 748.  
 (n) 5 East, 345.  
 (o) 3 Bl. Com. 112.  
 (p) 8 A. & E. 610; 3 N. & P.  
 577.

into any disquisition as to the origin of church rates; so far from its being any encroachment on the part of parishioners, as suggested on the other side, that the should be made by them, it rather appears from the authorities that the imposition of the burden of repairing the church was an encroachment upon them, and that rates for such repairs were originally paid out of the : *Degge* Pars. Couns. (a), *Burn's Eccl. Law* (b), 1 *Bl.* 384.

It is important to remember that church rate is not a charge upon the land, but on the person in respect of his property: *Jeffrey's* case (c): and that by custom it may be levied upon personal property, such as shipping and stock : *Miller v. Bloomfield* (d); *Burn's Eccl. L.* (e).

The first question (whether, under the circumstances, the churchwardens have the power to impose a rate) decides the whole case; if they have such power, there is no excess of authority by the spiritual court in enforcing what they have not, it is not in fact a church rate, any more than if it had been made by the sexton or the constable; the mere fact of calling it a church rate will not invest it with the legal attributes of one, so as to bring it within the jurisdiction of the ecclesiastical courts. If the churchwardens have power to make a rate, they can also fix the amount, as was in fact decided in *Gaudern v. Selby* (f), a decision that is clearly untenable. The onus is on the other side to shew that the churchwardens have this extraordinary power of taxation, for which there is no analogy in any part of our law. Overseers and surveyors of highways have been mentioned as having the power to impose rates without the concurrence of the parishioners, but they are required in the first instance to call the parishioners

1840.

VELEY  
v.  
BURDER.

Part i. ch. 12, p. 170, 3d ed.

Tit. Appropriation.

Rep. 66, b.

(d) 1 Add. Ecc. R. 499; 2 Id. 30.

(e) Tit. Church, ix. 12.

(f) 1 Curt. Eccl. Rep. 394.

1840.

VELEY  
v.  
BURDER.

together, which it is admitted on all hands the churchwardens must do before a valid church rate can be assessed.

In neither of the cases that have been cited of monitions against churchwardens does it appear but that they had funds in hand; and no instance can be found of such proceedings, except where they either had funds or had the means of getting them; that they were not liable except in such cases is stated by *Lyndwood*, who also expressly says, that the old means of compelling the reparation of the church was either by excommunication of particular parties, or by placing the whole parish under interdict (a).

All the common law authorities, with the exception of *Thursfield v. Jones*, support the doctrine that the church rate is to be made by the parishioners in vestry, and that it is only in the case of their not attending that the churchwardens, then representing the whole parish, are empowered to make the rate: Y. B. Tr. 44, E. 3 (b), *Jeffrey's case* (c), *Methold v. Winn* (d), *Anon.* (e), per Lord Tenterden C. J. in *Cockburn v. Harvey* (f), *Wayte v. German* (g), *Com. Dig. Esglise* (G. 2), *Pierce v. Prouse* (h), *Rogers v. Davenant* (i), *Anon.* (k), *Roberts's case* (l), *Wheler v. Lambert* (m), *Groves v. The Rector of Hornsey* (n), *Dawson v. Wilkinson* (o), *Northwaite v. Bennett* (p). In *Rex v. Wilson* (q), where the Court refused a mandamus to churchwardens to make a rate, they observed, "You cannot call upon the churchwardens to make a rate; you can only call upon them to hold a vestry meeting for that purpose." There is also

(a) Lib. i. De Officio Archidiaconi, fol. 28 (ed. Par.), fol. 39 (ed. Lond.)

(b) Fo. 18, pl. 13.

(c) 5 Rep. 66, b.

(d) 1 Rol. Abr. 393; 4 Vin. Abr. Churchw. A 2, pl. 3, 4.

(e) Poph. 197.

(f) 2 B. & Ad. 797, 799.

(g) 2 Show. 141.

(h) Salk. 165; vid. ante, p. 479. S.C. nom. *Hawkins v. Lyon*, Con-

sett, Prac. Spir. Courts, 414.

(i) 1 Mod. 194, 237; S. C. 2 Mod. 8; S. C. *Anon.* Freem. 286.

(k) 1 Mod. 79.

(l) Hetl. 61; S. C. Godol. Eccl. Law, 148.

(m) 3 Keb. 533; S. C. Bac. Abr. Churchw. (A.)

(n) 1 Hagg. Con. Rep. 188.

(o) Ca. t. Hardw. 381; Andr. 11.

(p) 2 C. & M. 516; 4 Tyr. 236.

(q) 5 D. & R. 602.

negative authority of the best writers on ecclesiastical law, none of whom, with the exception of *Degge*, speak of such a power: *Ayliffe Parerg.* (a), *Gibs. Cod.* (b), *Prid. Churchward.* (c). The form of the rate also, which mentions the assent of the parishioners (d), is a strong authority on the subject. In Archbishop *Cranmer's* work, entitled *formatio Legum Ecclesiasticarum* (e) (which was prepared about the time of the Reformation, but never received the sanction of a law), he suggests that where the church should require repairs, and the churchwardens should not have sufficient funds for the purpose, they should be empowered, "with the consent of four of the graver parishioners," to propose a rate upon the parish—a proposal that would have been quite unnecessary, if the churchwardens had at that time the power to make a rate of their own authority.

In *Oughton's Ordo Judiciorum*, there is a collection of forms of proceedings against parties for not paying church rate, and in every instance it is stated that the rate was made by the parishioners, or by the churchwardens and the majority of the parishioners (f). In *Clift's Entries* (g) there is a precedent in prohibition to the ecclesiastical court in a writ for church rate, where it appeared that the rate was made by only a few parishioners (*per pauculos parochianos*). The authorities relied upon by the other side have but little application to the question. The statutes of *Circumspectè* *actis* and *Ne rector prosternat* may be important to shew the obligation of parishioners to repair the church; but the question here is, how that obligation is to be enforced. *Degge* is the only writer who broaches the doctrine contended for before the case of *Thursfield v. Jones*, and he expresses his opinion very doubtfully; all the other authorities that have been cited on the other side rely on that

1840.

VELEY

v.

BURDER.

(a) Page 455.

(b) Page 196, 2d edit.

(c) Pages 77, 78, edit. *Tyrw.*(d) See Burn's Eccl. Law, tit. Church, ix. 13; *Prid. Churchw.* by *Tyrw.* 87; *Rog. Eccl. L.* 993.(e) As to this work vid. per Sir *W. Scott* in *Hutchins v. Denziloe*, 1 Hag. C. Rep. 173.

(f) Vol. ii. pp. 292, 325—500.

(g) Tit. Prohibitio (3), p. 581.



1840.

VELEY  
v.  
BURDER.


case, which amounts, however, to nothing more than a mere *obiter dictum*, thrown out when a rule to shew cause why a prohibition should not issue was granted. *Gaudern v. Selby* cannot be a binding authority on this Court, who will consider themselves in the same position as if deciding upon a motion for prohibition in that very case; and the case itself contains no cited authority to support the doctrine laid down in it. The report of the ecclesiastical commissioners only shews that the opinion was entertained by some learned persons, but that it was anything but an established doctrine. The statute 10 *Anne*, c. 11, gives no fresh powers to churchwardens.

The *second* question, as to the power of the common law courts to issue prohibition in this case must be argued upon the supposition that the rate is illegal and void; not merely irregular, but a positive nullity, over which the ecclesiastical courts have no jurisdiction. It is said that the only method of impeaching the decision in the spiritual court is by appeal; if that were so, the appeal, before the statute 24 *Hen.* 8, c. 12, would have been to the Court of Rome<sup>(a)</sup>, so that the Pope would have had to decide upon the legality of a tax imposed upon the subjects of the realm without their consent. It was to prevent such evils that the writ of prohibition was framed, and it always issued where the ecclesiastical courts exceeded their jurisdiction. *Rogers v. Davenant* is an authority precisely in point; in that case a church rate had been made by ecclesiastical commissioners; it was equally called a church rate with the present, but the temporal courts prohibited the ecclesiastical courts from enforcing it, thereby deciding upon its validity. The question, by whom a valid church rate may be

(a) A question having been raised, as to whether an appeal to Rome was forbidden by any earlier statute, the Attorney General, on a subsequent day, referred to the following as the only statutes

bearing on the subject, and none of them prohibiting such appeal; 25 *Edw.* 3, st. 6; 27 *Edw.* 3, st. 1, c. 1; 38 *Edw.* 3, st. 2; 13 *Rich.* 2, st. 2, c. 2; 16 *Rich.* 2, c. 5.

is in fact part of the common law; though the  
on law courts may not have any power to enforce the  
rules for granting prohibition are well laid down in  
Dig. Prohibition (F 1). There are innumerable in-  
s, besides *Rogers v. Duvellant* and *Pierce v. Prouse*,  
the temporal courts have granted prohibition in  
connected with church rate: *Rol. Abr. Prohibition*  
*Rebow v. Bickerton*(a), *Blank v. Newcomb*(b), *Cham-*  
*case*(c), *Anon.*(d), *Husly v. Cassock*(e), *Woodward's*  
*Anon.*(f), *Anon.*(g), these cases are sufficient to shew that the  
ral courts will interfere in such matters where they  
ccasion for so doing. So in other matters which  
facie are clearly of ecclesiastical jurisdiction; as in a  
on of churchwarden's accounts; *Wainwright v. Bag-*  
*h*), and in questions concerning the validity of mar-  
, *Harrison v. Burwell*(i), *Anon*(k), *Hicks v. Harris*(l),  
: *v. Boyle*(m). So in a suit concerning pews in a  
h, *Byerly v. Windus*(n). In *Blacket v. Blizzard*(o)  
*Lockburn v. Harvey*(p) the question was also concern-  
church rate, and prohibition went; however, it will be  
that these two cases turned upon the construction of  
es, but it is not very easy to draw any sound distinction  
is respect between statutes and the common law, as  
tter is supposed to have been founded on statutes. It  
nake no difference in fact whether a church rate con-  
ies the provisions of a statute or of the common law, in  
case the temporal courts will interfere by prohibition.  
e cases cited on the other side are all distinguishable. In


1840.  
  
VELEY  
v.  
BURDER.

|                              |                                 |
|------------------------------|---------------------------------|
| Bunb. 81.                    | Cunn. 33; Andr. 11, n.; 7 Mod.  |
| Holt, 594.                   | 208.                            |
| Noy, 136.                    | (i) Vaugh. 206.                 |
| 12 Mod. 416.                 | (k) 2 Mod. 314.                 |
| Comb. 132, 148.              | (l) Comb. 200; 12 Mod. 35.      |
| 3 Mod. 211; 1 Salk. 164;     | (m) 3 Mod. 164; Comb. 72.       |
| . 132; Consett, Prac. App.   | (n) 5 B. & C. 1; 7 D. & R. 564. |
|                              | (o) 9 B. & C. 851; 4 M. & R.    |
| 7 Mod. 122.                  | 641.                            |
| 2 Stra. 974; 2 Barnard. 421; | (p) 2 B. & Ad. 797.             |

2391.  
 ~~~~~  
 VILLY  
 v.  
 BRISER

all of them there was a good reason why the prohibition should be refused. In *Felt v. Hatchins* the party who applied for the prohibition had submitted to the trial in the ecclesiastical court, and the application was not made till after sentence. In *Starkey v. Barton* the ecclesiastical court had come to a right decision. The rules laid down in *Chadron v. Harris* and *Back v. Amcotts*, and the *Anonymous* case in *March*, have no application to this case. In *Bridgman's* case the prohibition did go to the Admiralty, although the cause relating to a ship was *prima facie* within their jurisdiction. *Copley's* case was a question concerning the taking the sacrament, which was one purely of ecclesiastical law; and in that case also the ecclesiastical court had come to a right decision. So also in *Juxon v. Byron*. *Gucillan v. Gill* was a suit for a legacy, for which no remedy lies at common law. In *Leman v. Goulty*, the prohibition went, in a suit concerning churchwardens' accounts, which is one of ecclesiastical jurisdiction. In *Wilson v. M' Math*, *Rex v. Cole-ridge*, and *Lee's* case, the matters were indisputably of ecclesiastical cognisance, and there was nothing to shew that the spiritual court had exceeded its jurisdiction. Prohibition was refused in *Jeffrey's* case and *Paget v. Crumpton*, because the temporal courts considered the rate a good one, and therefore a fit subject for ecclesiastical cognisance; in *Chesterton v. Farlar* no step had been taken by the court against which prohibition was sought; *Ex parte Smyth* turned upon a point of practice in the ecclesiastical court, with which the temporal court would not interfere. In *Griffin v. Ellis* the rate was good on the face of it, and the ground of objection to it was one that would have made it voidable only, not void and a nullity *ab initio*, as it is contended the rate is in this case, and so shewn to be on the face of it. In *Camden v. Home* it is expressly stated in the judgment that the reason for refusing the prohibition was, that the inferior court had come to a right decision. In *Blunt v. Harwood* the prohibition would have gone, on the ground that the rate was bad, if the libel had

It has been amended. It may not be easy to draw the line, but wherever it is drawn, this rate being a nullity on the face of it, must fall within it.

1840.  
  
 VELEY  
 v.  
 BURDER.

Sir *W. W. Follett* in reply. There is no reason for the proposition that the obligation to repair the churches was transferred to the parishioners from the clergy by any usurpation on their part; no time at least can be shewn when in England this obligation did not exist as at present, is at all events as ancient as the times of Canute (*a*). It is not to be supposed that this obligation is peculiar to the law of England; it appears to have been the law of Scotland, of France, and indeed of many parts of Europe; *Wilk. Conc.* (*b*), *Lindenbrogius's Cod. Leg. Ant.* (*c*), *Fericourt, Loix Ecclesiastiques des François* (*d*), *Van Espen de Ecclesiasticum* (*e*).

The only question then is how this legal obligation can be enforced, and though the proceedings by ecclesiastical censures may be still in force against individuals refusing to incur in making a necessary rate, that by no means proves that the churchwardens have not the power contended for, where the majority of the parish contumaciously refuse to perform their duty. The church building acts shew that such an authority on the part of the churchwardens is not unknown to the law. The leading distinction between the present case, and those relied upon by the other side, has been already pointed out, viz. that here the rate is made for *necessary* repairs, a distinction recognised in the judgments in *Pearce v. Hughes* (*f*) and *Tann v. Owen* (*g*). In the case cited from the Year-books there was a custom set up, which brought the question within the jurisdiction of

(*a*) Ancient Laws and Institutes, published by the Record Commission, vol. i. p. 411; vol. ii. p. 540; *Spelm. Conc.* 121.

(*b*) P. 608.

(*c*) P. 688.

(*d*) P. 640. ed. 1719.

(*e*) Pars. 2, s. 2, tit. 1; c. 6, § 26, vol. i. p. 638.

(*f*) 3 Hagg. Con. R. 10, 16.

(*g*) Consist. Lond. June 6, 1834. Month. Law Mag. Pt. 2, p. 86, 90.

1840.



VELEY

v.

BURDER.

the temporal courts. In *Roberts's* case the question was, as to re-edifying the seats, which is not necessarily a charge upon the church-rate. In *Rogers v. Dacenant* (a) it appears that the commission had been issued by the ecclesiastical court, and not by the bishop, though in his name; this therefore was an attempt on the part of the ecclesiastical court to raise a rate by their own authority, which was a manifest excess of their jurisdiction. *Miller v. Palmer* (b) is an express authority that churchwardens are liable to civil proceedings for neglect of repair.

With regard to the *second* point, if the position contended for on the other side is correct, it must follow that in every case which is properly within the jurisdiction of the ecclesiastical court, if they make any mistake either in law or fact, the common law courts may at once prohibit them from proceeding with it. That a question as to the validity of a church rate is a matter of ecclesiastical jurisdiction cannot be disputed; how then can it be said that there is any excess of jurisdiction in the spiritual courts entertaining and deciding upon such a question. Among the grounds given by the judges A. D. 1605, for issuing prohibition, which have been before cited, it is said, "Prohibitions do not import that the ecclesiastical courts are aliud than the king's, or not the king's courts; but do import that the cause is drawn into aliud examen, than it ought to be (c)." And this is the only true reason for issuing prohibition, which cannot apply to such a case as the present. The jurisdiction of the spiritual courts to decide upon the validity of a church rate, is not even taken away by 53 G. 3, c. 127, in cases where a power of enforcing the rate is there given to the justices; *R. v. Milnrow* (d). The cases with regard to prohibition in the older reports are not always very intelligible; and it even appears that in some cases, where it is stated by one reporter that the prohibition went, another states that it was refused: the cause of this discre-


(a) 1 Mod. 194; 2 Mod. 8.

(c) 2 Inst. 602.

(b) 1 Curt. Eccl. R. 540.

(d) 5 Mau. &amp; S. 248.

pany appears to be, that the case was reported in the first instance when the rule nisi for the prohibition was granted, and then again upon the argument for making the rule absolute; this appears in *Manne's* case (a), in which, according to *Moore*, the prohibition was granted, and according to *Croke* refused; this difference is pointed out and explained in *Harrison v. Burwell* (b). The same state of facts occurs in *Parson's* case (c) and in *Woodward's* case (d). If the ecclesiastical court is wrong in deciding the present rate to be valid, it is at most a mistake in law, and therefore clearly the proper case for an appeal, and not for a prohibition; per *Eyre* C. J. in *Home v. Camden* (e); *Griffin v. Ellis* (f).

1840.  
  
 VELEY  
 v.  
 BURDER.

*Cur. adv. vult.*

TINDAL C. J., in Hilary vacation (February 8th, 1841), delivered the following judgment of the Court.

This case, which has been brought before us by writ of error from the Court of Queen's Bench, involves two questions of considerable importance; first, whether the churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed by them to the parishioners at a vestry meeting duly convened for that purpose, and has been refused by a majority of the parishioners there assembled, can, of their own sole authority, at a subsequent time, by themselves, and not at any parish meeting, impose a valid rate on the parishioners; and the second question is, whether, if a rate be so made, and proceedings be taken by the churchwardens in the ecclesiastical court to enforce its payment, a court of common law can issue a writ of prohibition to the spiritual court to stay such pro-

(a) Moo. 907; S. C. Cro. El. 228.

(b) Vaugh. 206, 247, 248.

(c) Co. Lit. 235 a, cited in Vaugh. 248.

(d) 3 Mod. 211; S. C. nom.

*Woodward v. Mackpeth*, Comb. 132; S. C. nom. *Woodward v.*

*Makepeace*, 1 Salk. 164.

(e) 2 H. Bl. 536.

(f) 3 P. & D. 398.

1841.

~~~~~  
 VELEY  
 v.  
 BURDER.

ceedings. And we are all of opinion, on these questions, that the church rate, made under the circumstances and in the manner before stated, is illegal and void, and that a prohibition to the spiritual court may be well and properly issued.

In order to open the grounds and reasons of our answer to the first of these questions, it will be necessary to explain, in the first place, the nature of the legal obligation by which the inhabitants of every parish are compellable to repair and keep in repair the fabric of the parish church; and, in the next place, the mode prescribed by law for carrying such obligation into effect; from the consideration of which points it will be seen at once, and by necessary inference, whether the church rate now under discussion is a legal and valid rate, or the contrary.

And we are all of opinion that the obligation by which the parishioners, that is, the actual residents within, or the occupiers of lands and tenements in, every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to the performance of divine service therein, is an obligation imposed on them by the common law of the land. That such obligation is not grounded on the force of the general ecclesiastical law is manifest from this, that, by the authority of all the writers on the general canon law, the repairs of the whole of the parish church, both the body and the chancel, fall upon the rectors or owners of the tithes, except that by custom in some countries, part falls upon the parishioners. (*Van Espen*, *Jus Ecclesiasticum Universum* (a), *De Reparandis Ecclesiis*; *Lyndwood* (b).) Whereas, in England, to use the words of *Johannes de Athona*, in his commentary on the Legatine Constitution of *Othobon* (c), passed in the year 1268, “By the common custom of England, the repair of the nave of the church, in which the lay parishioners sit, falls upon the


(a) Pars II. sec. II. tit. I. cap. VI. Vol. 2, p. 635, ed. Lovan.

(b) P. 53, note k.

(c) Tit. De Domibus Ecclesiarum Reficiendis, *Lyndw. Const. Leg.* p. 112, Ox. ed.

parishioners themselves; but the repair of the chancel falls on the rector;" or again, according to *Lyndwood* (a), "by custom" (that is, by the common law) "the burthen of reparation, at least of the nave of the church, is transferred upon the parishioners." No trace can be found in any of our books of an obligation on parishioners to repair the parish churches throughout the whole of the realm less wide and extensive than this. And, as to the antiquity of this obligation, the case cited in argument from the Year Book, 44 *Edw.* 3, fo. 18, whilst it establishes the fact that church rates were made by the parishioners at so early a period as the year 1370, does at the same time, by a plea therein contained of a custom from time immemorial within the particular parish to levy the amount of the rate on each parishioner by distress, necessarily carry back beyond the time of legal memory the obligation of the parishioners to make a rate upon themselves for the reparation of the parish church; and such a custom, existing beyond the time of legal memory, and extending over the whole realm, is no other than the common law of England. The same position is laid down by *Holt* C.J. (b): "By the civil and canon law," he says, "the parson is obliged to repair the whole church, and is so in all Christian kingdoms but in England; for it is by the peculiar law of this nation that the parishioners are charged with the repairs of the body of the church." In which, however, he is incorrect in limiting the custom to England, as it extended undoubtedly to some other countries in Europe. The same doctrine is laid down in *Ayliffe's* Parergon, 455, a work of high authority.

Such then being the law of the land, it follows, as a necessary consequence, that the repair of the fabric of the church is a *duty* which the parishioners are compellable to perform; not a mere *voluntary act*, which they may perform or decline at their own discretion; that the law is imperative upon them absolutely, that they do repair the

1840.  
  
 VELEY  
 v.  
 BURDER.

(a) P. 53.

(b) *Hawkins v. Rous*, Carth. 360; *Holt*, 139.




1840.

~  
VELEY  
v.  
BURDER.

church ; not binding on them in a qualified limited manner only, that they may repair or not, as they think fit ; and that, where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate and determine is, not whether they will repair the church or not (for upon that point they are concluded by the law), but how and in what manner the common law obligation, so binding them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect. The parishioners have no more power to throw off the burthen of the repair of the church, than that of the repair of bridges and highways : the compelling of the performance of the latter obligation belonging exclusively to the temporal courts, whilst that of the former has been exercised usually, though perhaps not necessarily exclusively, by the spiritual courts from time immemorial. Now all the authorities agree, and there has been no difference on this point at the bar, that there is one mode of carrying the law into effect, and *that* the usual and ordinary mode, which is free from all possible exception, viz. that the churchwardens, whose duty it is to raise the money for the repair of the church, and to make the repairs, should convene the parishioners together by due notice, and that the majority of those who are so assembled should make an order for a rate, which will bind the whole parish. Such order is, as was said by the three judges (*Wyndham, Atkyns* and *Ellis*), “in the nature of a bye-law,” which the greater part of the parish can make ; “and to this purpose they are a corporation ;” *Rogers v. Davenant* (a). And this course of proceeding was well known, in other instances, to the common law. For long before any statutory remedies were provided for the reparation of highways and bridges, or sea walls, in the maintenance of which the public had a common interest, the inhabitants of parishes and townships and districts, who

(a) 1 Mod. Rep. 194.

were bound by law, or custom, or prescription, to keep them in repair, had the power of raising, and were accustomed to raise, the necessary funds for those purposes by an order or bye-law made by themselves. In the case from the Year Book (a) already referred to, *Kirton*, one of the judges, says, "there is a custom through the whole country, which the law calls bye-law, i. e. by assent of neighbours to levy a sum to make a bridge, a causeway, or a sea wall; and by their assent to assess each neighbour at a sum certain, for which they may distrain." And it is obvious that the power of making a bye-law by the majority to bind the rest must have been incident to the obligation to repair; for without it the obligation itself could not have been carried into effect. Upon the same ground also the power of making bye-laws is incident to corporations aggregate, in order to carry into effect the object and purposes for which they are created. Lord Coke lays it down expressly, in the *Chamberlain of London's case* (b), that the inhabitants of a town may, without any custom, make ordinances or bye-laws for the reparation of the church or highways, or of any such thing which is for the general good of the public; and in such cases the greater part shall bind the whole without any custom. And the case before cited from the Year Book furnishes an indisputable authority that the power of assessing a rate upon themselves by the majority of the parishioners, assembled at a meeting, for repairing their church, must have been a power that existed from time immemorial. No one, however, disputes the validity of a rate so imposed, and certainly no question has been raised upon its validity before us; all concurring in opinion that such a rate is good, and that the payment of each man's proportion thereof might be enforced by a suit in the ecclesiastical court. As little difference of opinion arises as to the validity of a rate imposed by the churchwardens alone, where a meeting of the parishioners has been duly convened in vestry for the purpose of making

1840.  
  
 VELEY  
 v.  
 BURDER.

(a) 44 Ed. 3, f. 18.

(b) 5 Rep. 63 a.

THAT  
 ~~~~~  
 THAT  
 ~~~~~  
 THAT

such rate, but where none of the parishioners have thought it to attend and express an opinion; for in this state of circumstances the churchwardens, who may be assumed to be parishioners themselves, do in effect constitute the majority, or, more properly speaking, the whole of the parishioners who are assembled in vestry; and, therefore, upon the principle above laid down, they must have authority to bind the absent parishioners. But the rate in question, upon the validity of which our judgment is demanded, varies in most important particulars from both the preceding cases; and the question to be resolved with respect to that rate is, whether, after a meeting has been duly convened, and certain of the parishioners have attended, and the majority of those who so attend have refused to make any rate for the necessary repairs of the parish church, the churchwardens have authority, by themselves, and not at the meeting at which the refusal took place, but at a subsequent time, to make a rate that shall be binding on the parish. Such a power, if it could be shewn to exist by custom in any particular parish, might indeed seem, in its own nature, not to be unreasonable; as it would amount to no more than a mode of carrying into complete effect, through the means of a public officer, the performance of that duty which is cast upon the parishioners by the general law of the land, after they had themselves refused or neglected to take upon them the primary method provided by the law, that of taxing themselves at a parish meeting; observing, at the same time, that, if any objection should arise as to the necessity of the rate, the amount of the rate, or the liability of any of the persons rated, all those questions might be afterwards raised and determined in the spiritual court. There is, however, no suggestion in this case of the existence of any such custom; and the only question is, whether the defendants below, the churchwardens, can bring forward any authority or argument that such power is vested in the churchwardens by the general law of the land. Now the authorities which have been referred to, and which

are all that can be found in the books in support of that proposition, appear to be inapplicable to the present case, and overbalanced by those which are produced on the other side. In fact, there is but one single common law authority cited in support of the affirmative of this position; and that is the dictum of the Court in the case in 1 *Ventr.* (a), viz. "that the churchwardens (if the parish were summoned and refused to meet, or make a rate) might make one alone, for the expenses of the church, if needful; because that, if the repairs were neglected, the churchwardens were to be cited, and not the parishioners." That this is an obiter dictum of the Court only, and not a resolution or judgment upon the point, is evident from this, that a rule was granted to shew cause why a prohibition should not go in that case; and it is left uncertain whether the prohibition issued or not. And it is this dictum which gives occasion to the several passages inserted in the various text writers to which reference was made; viz. *Watson's Clergyman's Law*, *Wood's Institutes*, *Bacon's Abridgement*, and the other abridgements referred to at the bar. These various repetitions, derived from the same source, cannot raise the authority of the proposition itself higher than that which it originally possessed. And, with respect to the case in *Ventris*, which is at best extremely short and unsatisfactory, it is by no means inconsistent with the statement in that case, that the rate made by the churchwardens was made at the very meeting at which the majority refused their assent; a circumstance which might give rise to a very different conclusion, and on which an observation will afterwards be made. It is also to be remarked that Sir *Simon Degge*, in his *Parson's Counsellor*, mentions it only as his own private opinion that, if the parishioners refuse, the churchwardens may make a rate alone. "If the parishioners," he says, "when they come together at such meeting refuse or neglect to join in making such assessment, or refuse to meet, I conceive the churchwardens, having just cause for

1840.

VELEY  
v.  
BURDER.

(a) P. 367, (January, 1633.)

1840.

VELKY  
v.  
BURDER.

such assessment, may proceed alone;" and in the third edition of his work, in 1681, is added, for the first time, "but some are of opinion that the churchwardens cannot proceed alone, but must compel the parishioners to do it by ecclesiastical censure. Ideo quære;" thus affording a very strong inference that he placed no great reliance on the soundness of his former position. The authority of *Ayliffe*, in his *Parergon* (a), is directly opposed to it; and, without referring particularly to the several common law authorities which have been brought in review before us, it may be sufficient to say that the weight of such authorities appears to us to be strongly in favour of the plaintiff below. With respect to the case of *Gaudern v. Selby* (b), decided before Sir *William Wynne*, on an appeal to the Court of Arches in the year 1799, and which has been much relied upon by the counsel for the churchwardens, one observation that arises is, that the church rate in that case was made by the churchwardens at the same vestry meeting which had been duly summoned, and at which it had been refused by the majority of the parishioners there present; a fact which forms a most important distinction between that and the present case. The churchwarden in that case required a rate at a larger sum, and a majority of the parishioners present refused it for that sum, though they were willing to grant it for a smaller; and the churchwarden nevertheless made the rate, against the consent of the majority, for the larger sum. We do not enter into the discussion whether a rate so made by the churchwardens, at the parish meeting where the parishioners were then met, would have been valid or not; or how far such case may be analogous to that of the members of a corporation aggregate, who, being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to any election; in which case they have been held to throw away their

(a) P. 455.


(b) 1 Curt. Ecc. Rep. 394, and

the *Braintree Church-rate case*, by Johnson, 109.


otes, and the minority, who have performed their duty by voting, have been held to represent the whole number. It is obvious, indeed, that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and minority together, making a rate at the meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time however distant. It is unnecessary however to discuss this point, as the facts of the present case do not bring it before us; it is sufficient to say, whilst we give no opinion upon it, we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur.

Upon the whole, therefore, with respect to the question first raised, we are of opinion, for the reasons above given, that the present rate is illegal and void.

The second question therefore arises, viz. whether a court of common law has the power to prohibit the ecclesiastical court from proceeding to enforce this rate; which rate, for the purpose of raising the present question before us, must be assumed to be illegal and void. The first ground of objection urged against the issuing of the prohibition in this case was, that by the statute 13 *Edw. 1*, commonly called *Circumspectè agatis*, the ecclesiastical courts have sole and exclusive jurisdiction upon the question of the repairs of churches. That statute orders the temporal courts not to interfere with the bishops or clergy, "when they hold plea in court christian of such things as be mere spiritual;" and the statute then proceeds, amongst other articles which are enumerated, to enact thus: "Item, if prelates do punish for leaving the churchyard unclosed, or for that the church is uncovered, or not conveniently leaked; in which cases none other penances can be enjoined than pecuniary." And, after mentioning other instances, the statute concludes, "In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

1840.  
  
 VELEY  
 v.  
 BURDER.


1840.

  
VELEY  
v.  
BURDER.

Now, upon the construction of this statute no doubt has ever been raised or can exist, but that the spiritual court has power and jurisdiction, by ecclesiastical censures, to compel the churchwardens to perform their duty in relation to the repairs of the church; to compel the parishioners to perform their duty in providing the means to make such repairs; and, after a legal rate has been imposed, to compel each individual to contribute the sum assessed upon him. But the case before us is neither the case of a proceeding by the spiritual court against churchwardens for not causing the church to be repaired, nor of a proceeding of the spiritual court against parishioners who have refused to join in making a rate, nor of a proceeding against the individuals named in a rate which has been made by the churchwardens and parishioners. It is a proceeding instituted in the spiritual court to enforce the payment of a rate made by the churchwardens alone, and without the parishioners, not made in vestry, nor at the time for which they had been convened and had neglected or refused to attend; and the question is, whether the spiritual court having admitted the libel of the churchwardens to proof, that is, in effect having decided upon the validity of such rate, the libel itself shewing upon the face of it that the rate is a nullity at the common law, the queen's writ of prohibition may issue. And we are all of opinion that in such a case the writ of prohibition well lies. And this opinion we ground, as well upon the consideration that it falls within one of those classes of cases which are universally admitted to form exceptions from the jurisdiction of the spiritual court, although the original subject-matter of the cause is itself undoubtedly within such jurisdiction, as also upon the authority of numerous decisions in the courts of Westminster Hall, in cases which cannot be distinguished in principle from the present.


The first and largest class of cases in which prohibitions have been granted by the queen's courts at Westminster, is, where a plain and manifest excess of jurisdiction has ap-

eared to have been claimed or exercised by the ecclesiastical court; and it is under this head of exception that the present case will be found, if not directly yet by necessary implication, to range itself. The others are founded on the general principle that, notwithstanding the subject-matter is of ecclesiastical cognisance, the party would receive some wrong or injury by the course of proceeding in the ecclesiastical court, or be deprived of some benefit or advantage to which the common or statute law would have entitled him. One class of those cases is, where such court is proceeding to try a matter which is triable only by the common law; as a custom, prescription, or modus. Another, where, in a case of spiritual cognizance, a collateral question arises which is not properly of spiritual cognisance; in which case the courts of common law oblige them to admit such evidence as the common law would allow; *Breedon v. Gill* (a): as when, for example, a lease is offered to be proved in an ecclesiastical court, and is rejected because by their law two witnesses are required; or, for the same reason, where the fact in dispute is the payment of a legacy. Another, where the spiritual court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal courts. And, lastly, another class of exceptions, which seems to apply itself more closely to the case before us; namely, that—the spiritual courts being always bound to declare the common law when it becomes necessary to declare it, in the same manner as the common law courts would do—when, as in the present instance, the very groundwork and foundation of the proceedings of the spiritual court is the holding of a supposed church rate to be a valid rate, which, upon the construction of a court of common law, is held to be no rate at all; in such case, in order to prevent the conflict which would arise from a decision taking place one way in the spiritual court, and the opposite way in the courts of common law, the prohibition

1840.  
  
 VELEY  
 v.  
 BURDER.

(a) 1 *Ld. Raym.* 219, 222.



1840.  
  
 VELEY  
 v.  
 BURDER.

is allowed to go: Lord C. J. *Eyre's* judgment in *Home v. Camden* (a), and the judgment of Lord *Ellenborough* C. J. in *Gould v. Gapper* (b). The spiritual court has not only undoubted, but even exclusive jurisdiction to inquire into and to decide upon the necessity of the repair of the fabric of the parish church; and, in the exercise of such jurisdiction, that court may, perhaps, be able to compel the churchwardens to raise the money by a rate, or may punish the parishioners who wilfully refuse either to join in such rate or pay their respective proportions when regularly and legally assessed upon them; yet they cannot proceed to enforce the payment of that which, although called a rate upon the libel, shews that a burthen has been imposed on the parishioners by persons who, under the circumstances which attended the making of it, had no authority to impose it upon the principle of the common law.

As to the decided cases, it appears that prohibitions have been granted where the ecclesiastical court is proceeding to compel a person to contribute to the repair of a parish church as an inhabitant, whose land in the parish is on lease; *Jeffrey's* case (c); or where a person is charged in the parish where he inhabits in respect of land out of it (d); or where a man who takes a standing in the market in one parish, but dwells in another, is sued for repairs of the church of the former parish (e); or where one is rated in respect of *land* for ornaments (f); or where the rate is on some of the inhabitants only (g); or where the suit is to enforce an ancient rate, made some time before, and which had been made originally by commissioners of the ecclesiastical court, *Blank v. Newcomb* (h); or where the bishop's commissioners made a rate, and the suit was to enforce it, *Rogers v. Davenant* (i); or where the rate was

- |                                   |                                 |
|-----------------------------------|---------------------------------|
| (a) 2 H. Bl. 533.                 | pl. 5.                          |
| (b) 5 East, 370.                  | (f) 2 Roll. Abr. Prohibition K. |
| (c) 5 Rep. 67 b.                  | pl. 1.                          |
| (d) 17 Vin. Abr. tit. Prohibition | (g) Ibid. pl. 10.               |
| H. pl. 4.                         | (h) 12 Mod. 327.                |
| (e) 2 Roll. Abr. Prohibition H.   | (i) 1 Mod. 194; 2 Mod. 8.       |

made by the churchwardens without calling together the parishioners; or for a parish rate for making and repairing a parish organ, *Anonymous* (a). In all these and many other cases the prohibition was allowed to issue, although no one doubts but that the whole subject-matter of church rates, and the enforcing of them, is within the jurisdiction of the spiritual court. In all these cases, too, the same argument would have applied which has been urged in the present case before us, viz., that the objection is a proper matter of appeal, and not of prohibition; for that it is not to be assumed that the ecclesiastical court will do wrong. What real distinction, indeed, can be made between a rate that is held to be void on the ground of its being imposed by the bishop's commissioners, and a rate that is imposed by the mere authority of the churchwardens?

One argument has been urged in the course of the discussion before us, to which we think it right to advert. It has been said, that to allow the enforcement of church rates to be a matter of sole and exclusive jurisdiction of the spiritual court, and at the same time to allow the prohibition to issue, is, in effect, to take away all power of compelling the parishioners to repair the parish church. But it is obvious that the effect of our judgment in this case is no more than to declare the opinion of the Court that the churchwardens have, in this instance, pursued a course not warranted by law; and, consequently, all the powers with which the spiritual court is invested by law to compel the reparation of the church are left untouched. If that court is empowered (as is stated by *Lyndwood* (b) and other ecclesiastical writers) to compel the churchwardens to repair the church by spiritual censures; to call upon them to assemble the parishioners together by due notice to make a sufficient rate; to punish such of the parishioners as refuse to perform their duty in joining in the rate by excommunication, that is, since the statute of 53 Geo. 3, c. 127,

1840.

VELEY  
v.  
BURDER.

(a) 12 Mod. 416.

(b) P. 53, voc. Subpœna.

1840.

~~~~~  
 VELEY  
 v.  
 BURDER.

by imprisonment, and, under the same penalty, to compel each parishioner to pay his proportion of the church rate; the same power will still remain with the spiritual court, notwithstanding the decision of this case. The extent and nature of those powers not being now before us, it would be at once unnecessary and improper to give any opinion upon them. It is sufficient to say that all that we decide by this judgment is, that the rate, as it appears upon the face of the libel, is illegal, as being made without competent authority; and that a prohibition ought to go to restrain the spiritual court from proceeding to enforce it; and for these reasons we think the judgment of the court below must be affirmed.

A.

Judgment affirmed.

—————  
 IN THE QUEEN'S BENCH.  
 —————

Tuesday,  
 Nov. 10th.

G. FIELD v. G. ADAMES, H. ADAMES and others.

Cattle or goods  
 in the actual  
 use of a party  
 cannot be dis-  
 trained da-  
 mage feasant.

**TRESPASS.** The first count was for a common assault. The second stated that the defendants, on &c., with force and arms &c., seized, took and distrained divers goods and chattels, to wit, one mare, one gelding, and two sets of harness of the plaintiff of great value, to wit &c., and then took the said mare and gelding from and out of a certain cart to which they were then attached and harnessed, and in which they were then being worked and used by the said plaintiff, and then drove and led away the said mare and gelding, with the said sets of harness thereon respectively, and impounded the said mare, gelding and harness, and kept and detained the same so impounded for a long space of time, to wit, for the space of five days then next following, and until the said plaintiff, in order to obtain possession of the same, was forced and obliged to and did necessarily pay a certain sum of money, to wit, &c.

Plea, by three of the defendants to the first count, not

guilty, and by defendant *G. Adames* and two of the other defendants to the same, that defendant *G. Adames*, at the time when &c. was lawfully possessed of a close &c., and that just before the time in the first count mentioned, to wit &c., two certain horses and two sets of harness were wrongfully in the said close of defendant *G. Adames*, in which &c., doing damage to defendant *G. Adames* there, whereupon defendant *G. Adames*, and the said two other defendants, as his servants &c., seized and took the said horses &c., in the said close of defendant *Adames* so doing damage therein as aforesaid, as a distress for the said damage; and the defendant *G. Adames* and the said two other defendants, as his servants &c., were then, to wit &c., about to lead, drive and carry away the said horses and harness out of the same close in which &c., to a certain common pound in the county aforesaid, within the hundred where the said distress was taken, to impound the same there and to keep the same impounded until defendant *G. Adames* should be reasonably satisfied for the said damage so done by the said horse &c. as aforesaid, as it would have been lawful for the said defendant *G. Adames* and the said two other defendants to do for the cause aforesaid, and because the plaintiff afterwards, and just before the said time when &c., in the first count mentioned, to wit, on &c., unlawfully interfered with and interrupted the said three defendants in proceeding with the said distress, and at the said time when &c., stayed and continued interfering with and interrupting them as aforesaid, the said defendant *G. Adames* and the said two other defendants, as his servants &c. (*molliter manus imposuerunt*).

Plea, by all the defendants to the second count, a justification for a distress damage feasant, similar to that contained in the introductory part of the above plea.

Issue joined on the "not guilty."—Replication, to the plea by defendant *G. Adames* and the two other defendants (*viz.* to the first count) that one of the said horses and one of the said sets of harness in the said plea mentioned were, at the time of the seizing thereof as a distress, as in that plea mentioned, a horse and set of harness

1840.

FIELD  
v.  
ADAMES.

1840.

FIELD  
v.  
ADAMES.

of the plaintiff, and then under his personal care, and were then being actually used by the plaintiff, and that the other of the said horses and the other set of harness in that plea mentioned were, at the time of the seizing thereof as a distress, as in that plea mentioned, a horse and set of harness of one *Edward Field*, and were then in the actual possession of the said *E. Field*, and under his personal care, and were then being used by the said *E. Field*, whereupon the plaintiff in his own right, and as the servant &c. of *E. Field*, did interfere with and interrupt the said defendant *G. Adames* and the two other defendants in proceeding with the said distress, and stayed and continued interfering with and interrupting them, as in that plea mentioned, as it was lawful for him to do for the cause aforesaid &c. Verification.

Replication to the plea by all the defendants (*viz.* to the second count), that the said cattle, goods and chattels in the declaration mentioned, at the said time when &c., were in the actual possession of the plaintiff, and under his personal care, and were then being actually used by him. Verification.

Rejoinder to the replication to the plea by defendant *G. Adames* and the two other defendants, that the said one horse and set of harness in the said replication alleged to have been, at the time of the seizing thereof as a distress, as in the said first plea mentioned, in the actual possession of the plaintiff, and under his personal care, and actually used by him; and the said other horse and set of harness in the said replication alleged to have been, at the time of the seizing thereof as a distress, as in the said first plea mentioned, in the actual possession of *E. Field*, and under his personal care, and used by the said *E. Field*, were, and each and every of them was, respectively then so in the possession and under the care of the plaintiff and of the said *E. Field* respectively, for the purpose of being and were and each of them was respectively then so used by them the plaintiff and *E. Field* respectively wrongfully in the close of defendant *G. Adames*, in which &c., doing the da-

image to defendant *G. Adames* there as mentioned in the first plea. Verification.

Rejoinder to the replication, to the plea to the second count, similar to the last.

Demurrer to both rejoinders.

1840.

FIELD  
v.  
ADAMES.

*Peacock*, in support of the demurrer. The first question in this case is, whether the goods, being in the actual possession and use of the plaintiff, were liable to be distrained damage feasant; in *Storey v. Robinson* (a), which was an action of trespass for an assault and false imprisonment, and for seizing and leading away the plaintiff's horse upon which he was riding, it was decided that the distress could not be supported, and Lord *Kenyon* there said, "If it were permitted to a party to distrain a horse whilst any person is riding him, it would perpetually lead to a breach of the peace;" the present case is within that principle.

*G. T. White* contra. It is stated in *Gilbert's Law of Distresses* (b), "all chattels whatever are distrainable damage feasant, it being natural justice, that whatever doth the injury should be a pledge to make compensation for it, therefore all chattels are liable to make satisfaction for the trespass by them committed, and hence it is that the utensils of a man's trade, stacks of corn, and the horse on which a man rides, are distrainable damage feasant; and the horse may be led to the pound with the rider on him." In *Wagstaff v. Clack* (c) it is said, a horse may be distrained damage feasant, although he is led by a person at the time. In *Co. Lit.* 47 a, it is said, "If ferrets and nets in a warren be taken damage feasant it is good, but if they are in the hands of a man they cannot be distrained, any more than a horse on which a man is;" so that it would appear the distinction is, that goods to be privileged from distress must be in the manual occupation of a party. In *Bac. Abr. tit. Distress*, (F), it is said, "If men are rowing upon my

(a) 6 T. R. 138.

(c) Har. Dig. 947, *Distress*, (2d ed.)

(b) P. 38, 2d ed.

1840.

FIELD  
v.  
ADAMES.

water and endeavouring with their nets to catch fish, in my several piscary, I may take their oars and nets, and detain them as damage feasant, to stop their further fishing;" and he cites *Reynell v. Champernoon* (a). Here it lies upon the plaintiff, who seeks to defeat the common law right of distress, to bring his case within the exception; it appears from the facts stated, that he was not riding the horse at the time, and the case therefore does not fall within *Storey v. Robinson* (b). Again, the replication to the plea by G. Adames and the two other defendants to the first count is bad, for not stating the horse and set of harness of E. Field to have been *actually* used by him. The other allegations in that and the other replication are not open to this objection. [Lord Denman C. J. The word *actually* is surplusage, use is actual use.] Farther, the replications are bad for not averring that there was danger of a breach of the peace. Moreover, the rejoinders contain a sufficient answer to the replications. In *Storey v. Robinson* (b), it did not appear that the party was riding the horse for the purpose of committing damage; here it does so appear; it is therefore within the maxim, *volenti non fit injuria*.

LORD DENMAN C. J.—It appears from *Vin. Abr. tit. Distress* (A), *Damage Feasant*, that it was laid down in the 7 *Edw. 3*, "If a man rides on my corn I cannot take his horse damage feasant." The pleadings need not aver the danger of a breach of the peace in such a case; it would be naturally inferred.

LITLEDALE and WILLIAMS Js. concurred.

COLERIDGE J.—The defendant is merely left to his remedy by action for the trespass.

A.

Judgment for the plaintiff (c).

(a) Cro. Car. 228.

(b) 6 T. R. 138.

(c) The following case was de-

cided at the sittings in banc after  
Easter term, 1841 (May 10).

BUNCH v. KENNINGTON and another.

1840.  
FIELD  
v.  
ADAMES.

§ and asportavit of a certain dog, to wit, a terrier bitch of 1 beating it and tying a cord round its neck, per quod it died. nage feasant in a close, of which one E. H. G. was lawfully nd seizing the said dog as servants of E. H. G., as a distress damage, and leading it away to a convenient and proper he purpose of there impounding it, according to law, and for of so leading it, tying the said cord round its neck, and as unruly a little beating it, as defendant lawfully might for oresaid, &c. &c.

on: that the said dog was, at the time of the seizing thereof is, as in the plea mentioned, a dog of plaintiff, and was actual possession of one H. B., then being a son and ser- plaintiff, and was then under the personal care of and being said H. B., so being such son and servant as aforesaid. amurrer and joinder. The defendant's demurrer books were the margin—"The cause of demurrer is, that the allegations cation are insufficient to exempt the dog from being dis- alleged in the plea, and for other causes specially assigned." ff's—"The plaintiff will rely on *Storey v. Robinson* and nd on *Field v. Adames* (b).

support of the demurrer. "Being used" must be taken subjectam materiem; a dog may be in use when hunting distance from its master and out of his sight.

hile contrà.

IAM (c).—	Judgment for the defendant.
R. 138.	(c) Lord Denman C. J., Patteson,
receding case.	Williams and Wightman Js.

ie QUEEN v. The Inhabitants of PRESTON.

Saturday,  
Nov. 28th.

real against an order for the removal of *Ann Minto*, of *Daniel Minto*, and her three children from the of Great Bolton to the township of Preston, the confirmed the order, subject to the opinion of this on the following case. :—

An English-born emanci- pated child of Irish parents, who have no settlement, has a birth settle- ment, and is not remove- able with his

the hearing of the appeal the facts hereinafter parents, under the statutes for passing Scotch and Irish paupers.



1840.

  
 The QUEEN  
 v.  
 Inhabitants of  
 PRESTON.

stated were admitted, and the only point that was raised on the hearing of the appeal was, whether *Daniel Minto*, who was admitted to have been born in Preston, had a birth settlement there. *Daniel Minto* was born in the township of Preston, of Irish parents, who were both resident there at the time of his birth and for some years afterwards, but they subsequently removed to Manchester, where they have since dwelt. Neither of them ever had a settlement in England. He married the pauper, *Ann Minto*, at the Collegiate church in Manchester in 1832, and the children removed under the order appealed against are the legitimate children of *Daniel Minto* and the pauper *Ann Minto*. For some time after his marriage he continued to reside in Manchester with his wife apart from his parents, and at the end of that time he and his wife quitted Manchester, and went to reside in Great Bolton, where they lived together until about four months before the making of the order of removal, when he absconded, leaving his wife and family chargeable to Great Bolton, and they remained there so chargeable until they were removed under the said order. He did not reside with his parents after his marriage. He never did any act to gain a settlement, nor ever had a settlement in Preston, unless he was settled there by his birth as aforesaid.

The respondents contended that *Daniel Minto* was settled in Preston where he was born. The appellants contended that *Daniel Minto*, being the child of Irish parents, had not by reason merely of his being born in Preston any settlement there, and that he was incapable of having a birth settlement.

If *Daniel Minto* had a birth settlement in Preston, the order of sessions was to be confirmed; if he had not, then that order and the original order of removal were to be quashed.

*Bere* and *Wortley* in support of the order of sessions. The question depends upon the construction to be put

upon 3 & 4 Will. 4, c. 40, s. 2 (a), which is substantially a re-enactment of 59 Geo. 3, c. 12, s. 33. The 3 & 4 Will. 4, s. 2, enacts, that "it shall be lawful for two justices of the peace, and they are hereby authorised and required, upon the complaint of the churchwardens and overseers of the poor of any parish, township, or other place maintaining its own poor, that any person born in Scotland or Ireland, or in the Isle of Man or Scilly, hath become chargeable to such parish, &c. by himself, or herself, or his or her family, to cause such person to be brought before them, and to examine such person, &c. touching the place of the birth or last legal settlement of every such person, and to inquire whether he or she, or any of his or her children, hath or have gained a settlement in that part of the united kingdom called England; and if it shall be found by such justices that the person so brought before them was born in either Scotland or Ireland, or the Isle of Man or Scilly, and hath not gained any settlement in England, and that he or she hath actually become chargeable to the complaining parish, &c. by himself or herself, or his or her family, then such justices shall, &c. cause such poor person, his wife, and each of his or her children so chargeable, as shall not have gained a settlement in England to be removed, &c. to Scotland or Ireland, or the Isle of Man or Scilly, respectively, &c. &c."

1840.  
The QUEEN  
v.  
Inhabitants of  
PRESTON.


It is clear that before the 59 Geo. 3 the pauper's husband could have gained a birth settlement in Preston: *Rex v. Matthew, Bethnal Green* (b); and *Rex v. Great Clacton* (c) shews the law not to have been altered in this respect by that statute. *Rex v. Clacton* (c) decided that a child eight years old, born in England of Irish parents, who had no settlement in England, is removable to the place of his birth, and is not within 59 Geo. 3. The mother in that case, subsequently to the birth of the pauper, made a

(a) Continued by 7 W. 4, c. 10,  
and 3 & 4 Vict. c. 27.

(b) 2 Burr. S. C. 482.

(c) 3 B. & Ald. 410.

1840.

  
 The QUEEN  
 v.  
 Inhabitants of  
 PRESTON.

second marriage with a person who had a settlement in this country, and the judgment of the Court was, "without determining what might have been the case if the mother had also been removable at the time, it is clear here that, she having acquired a settlement by marriage, the pauper's case is to be considered as if he had no parent alive. Then, if so, the clause in question only applies to paupers who are themselves born in Ireland, which he was not." *Rex v. Whitehaven (a)*, *Rex v. Benett (b)*, and *Rex v. Cottingham (c)* also shew that the child of Irish parents may gain a birth settlement in this country. In *Rex v. Benett (b)* it was held that, under 59 *Geo. 3*, an Irish female pauper having a bastard child born in England, and within the age of nurture, may be passed to Ireland, but that the child cannot be sent with her, as the act does not authorise the removal of any settled person. The appellants will rely on *Rex v. Mile End Old Town (d)*. There a pauper born in England, not having done any act to gain a settlement in her own right, and being the daughter of Irish parents, who had gained no settlement, was, at the age of eighteen, delivered of a bastard in her father's house in England, where she resided as part of his family. The mother of the pauper having applied for relief for the pauper and her bastard only, it was held that, under 3 & 4 *Will. 4*, c. 40, s. 2, the pauper was removeable to Ireland, and not to the place of her birth in England. They will also rely on the language of *Patteson J.* in delivering the judgment of the Court. "It is true that in the case of *Rex v. Whitehaven (a)* the sessions had quashed an order of justices removing an Irish woman, pregnant, and living with her parents unemancipated, to her birth settlement, upon the ground (as appears by the case) that she ought to have been sent with her parents by a pass to Ireland, under stat. 59 *Geo. 3*, c. 12. s. 33, which has the

(a) 5 B. &amp; Ald. 720; S.C. 1 D. &amp; R. 439.

&amp; R. 384.

(d) 4 A. &amp; E. 196; S. C. 5 N.

(b) 2 B. &amp; Ad. 712.

&amp; M. 581.

(c) 7 B. &amp; C. 615; S. C. 1 M.

same expressions, as to the chargeability of the father, as the statute 3 & 4 *Will.* 4, c. 40, s. 2, viz. "become chargeable, and by himself or herself, or his or her family." And this Court quashed the order of sessions upon, as it seems, but little discussion, and with not very much consideration. Upon that case two things are to be observed: first, that the question, how far the woman, circumstanced as she was, could gain any settlement by birth was not noticed at all; whereas in the case of *Rex v. Leeds* (a) that question was considered, and it was held that birth in such a case gave no settlement." It is to be observed that *Rex v. Clacton* (b) is not adverted to in that judgment, and that all that is said by *Patteson J.*, as also the case of *Rex v. Leeds* (a) itself had reference to *unemancipated* children. But *Daniel Minto*, the pauper's husband, was *emancipated* at the time of chargeability. The words in 59 *Geo.* 3, c. 12, and 3 & 4 *Will.* 4, c. 40, s. 2, "if it shall be found, &c. that he or she hath actually become chargeable to the complaining parish, &c. by himself or herself, or his or her family, then such justices shall, &c. cause such poor person, his wife, and such of his or her children so chargeable, as shall not have gained a settlement in England, to be removed to Scotland or Ireland, &c." cannot apply to an *emancipated* child, who is not a member of the parent's family, and whose chargeability therefore would not attach as constituting chargeability on the part of the parent. The distinction between emancipated and unemancipated children will reconcile all the cases on this subject. The result is, that the English born child of Irish parents gains a settlement by birth, but that this settlement is in abeyance until emancipation, and that he is, in the event of chargeability during the interval, removeable with his parents to Ireland, and that on his emancipation the settlement is in force, and he is no longer removeable with them, (instances of settlement in abeyance are to be found in 4 & 5 *Will.* 4, c. 76, s. 71,) otherwise

1840.

The QUEEN  
v.  
Inhabitants of  
PRESTON.

(a) 4 B. &amp; Ald. 498.

(b) 2 Burr. S. C. 482.

1840.

The QUEEN  
v.


Inhabitants of  
PRESTON.

the consequence would be, that an illegitimate child born in England of Irish parents would gain a settlement, and a legitimate child would not.

*Cowling* contra. Before the stat. 59 *Geo.* 3, c. 12, Irishmen having no settlement were in the situation of any other foreigners without settlement, and were casual poor, relievable wherever they might be. This was felt as a grievance, and therefore the act passed to enable them to be removed to their own kingdom, but the same act, s. 33, (and the language of the late acts is substantially the same) leaves their children in the same situation as to settlement as their parents were previously, because an inquiry is directed to be made by the justices whether any of his or her children hath or have gained any settlement in any part of the united kingdom called England, which implies that their birth could not confer a settlement. The cases in which this point has been considered have laid down the same principle: *Rex v. Mile End Old Town* (a) and *Rex v. Leeds* (b), in which last case *Holroyd J.* observes, "by the act, if the husband becomes chargeable by himself or his family, he may be removed: and it seems to me that it is altogether immaterial, provided the head of the family be born in Scotland, whether the children be born in England or not. The only exception is as to those children who have gained settlements in England in their own right." What was said by *Patteson J.* in *Rex v. Mile End Old Town* (a) was not an obiter dictum, but part of a deliberate judgment of the whole Court, and the construction there put on the 3 & 4 *Will.* 4, c. 40, must be taken to have been ratified by the legislature, for the statute, after it had been so construed, was continued by 7 *Will.* 4, c. 10, and again by 3 & 4 *Vict.* c. 27. [*Coleridge J.* You contend that the statute takes away the settlement which the child had previously, and that it gives no other.] That is the argument—

(a) 4 A. & E. 196; S. C. 5 N. & M. 581. (b) 4 B. & Ald. 498.

Lord DENMAN C. J.—*Rex v. Clacton* (a) is in point, and must govern this case. Though *Rex v. Clacton* was shortly argued, there is no reason for saying that it was not well considered. The circumstances of *Rex v. Leeds* (b) and *Rex v. Mile End Old Town* (c) were very different; those cases are not opposed to *Rex v. Clacton*.

1840.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 PRESTON.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Order of Sessions confirmed.

(a) 3 B. & Ald. 410.

(c) 4 A. & E. 196; S. C. 5 N. &

(b) 4 B. & Ald. 498.

M. 581.

The QUEEN v. The Inhabitants of MELSONBY (d).

UPON appeal against an order of removal from the township of Melsonby, in the North Riding, to the township of Bishop Auckland, in the county of Durham, the sessions quashed the order, subject to the opinion of this Court, upon the following case:

In 1823, the pauper gained a settlement in Bishop Auckland.

In January, 1831, one *Merryweather* was the tenant of a

(d) Decided during the term (Nov. 11.)

May-day and Martinmas, gave up the premises to the pauper, and the landlord then agreed to take the pauper as his yearly tenant, provided he would answer for the current half year's rent. The pauper then entered, and continued to occupy till October, 1832. At May-day, 1831, he paid 5*l.* for the rent then due, and at Martinmas, 1831, he paid another 5*l.* for the rent due up to that time. He continued in the occupation until October, 1832, without paying any more rent. He then agreed with R. that R. should have possession, and should take his fixtures at 5*l.* and his furniture at 4*l.* 5*s.*, and should pay the landlord the 9*l.* 5*s.* for the rent due since Martinmas, 1831. R. took possession, and shortly after the landlord agreed to accept R. as tenant, and received from him an undertaking that he would pay the rent due from the pauper. At Martinmas, 1833, R. having failed to pay that or any subsequent rent, the landlord distrained for the whole amount. The distress, which consisted in part of the fixtures and furniture transferred by the pauper to R. to the value of 5*l.* paid the rent.

Held, that there had not been a payment of a year's rent by the pauper, so as to satisfy 1 Will. 4, c. 18, s. 1.

In January, 1831, M. being in possession of premises as tenant from year to year, upon a taking from Martinmas to Martinmas, at the yearly rent of 10*l.* payable half-yearly at

1840.

  
The QUEEN  
v.  
Inhabitants of  
MELSONBY.

separate and distinct house and premises in Melsonby, at the yearly rent of 10*l.*, payable half-yearly at May-day and Martinmas, which premises he had occupied for some time previous, and was then occupying as tenant from year to year. In January, 1831, *Merryweather* gave up the premises to the pauper, and at the same time the landlord agreed to accept the pauper as his yearly tenant from Martinmas to Martinmas, at the rent of 10*l.*, provided he would make himself answerable for the current half-year's rent.

The pauper entered into the said premises in January, 1831, and continued to occupy the same under the said agreement until October, 1832.

At May-day, 1831, pauper paid 5*l.* for the half-year's rent up to that time, having undertaken to pay both for the time in which the premises were occupied by *Merryweather*, and for the time since he was accepted as tenant himself.

At Martinmas, 1831, the pauper paid 5*l.*, being the half-year's rent due from May-day up to that time.

In October, 1832, the pauper agreed with one *Rhodes* to give up to him the possession of the premises. At that time the pauper had not paid any rent that became due after Martinmas, 1831, and it was agreed between the pauper and *Rhodes*, that *Rhodes* should take the pauper's fixtures in the house for the sum of 5*l.*, and also some furniture in the said house at 4*l.* 5*s.*, and that in consideration of the said fixtures and furniture, he should pay to the landlord the said sum of 9*l.* 5*s.*, the price of the said fixtures and furniture, for the rent due from Martinmas, 1831.

At Martinmas, 1831, the premises became the property of one *Young*. Shortly after *Rhodes* took possession of the premises in October, 1832, *Young*, the new proprietor, agreed with the pauper and *Rhodes* to accept *Rhodes* as his tenant, and received at the same time an undertaking from *Rhodes* that he would pay the rent due as aforesaid from the pauper.

Up to Martinmas, 1833, no rent whatever was paid by *Rhodes*, and there was then due the half-year's rent from

Martinmas, 1831, to May-day, 1832, and the whole rent from May-day, 1832, to Martinmas, 1833.

At Martinmas, 1833, *Young* entered a distress upon the premises, the same being still in the occupation of *Rhodes*, for the whole rent, from Martinmas, 1831, to Martinmas, 1833. The fixtures in the house were seized together with other things, and all were sold and produced sufficient to discharge the expenses of distress and sale, and the whole rent so distrained for; and which rent, after deducting the said expenses, was accordingly paid over to *Young*. Among the articles sold under the distress were some which had been transferred from the pauper to *Rhodes*, consisting of fixtures and furniture, to the value of 5*l.*, but there was no evidence of the sum which each of the fixtures or furniture, or the whole together, produced, except the general evidence before mentioned, of there being more than sufficient to cover the rent and expenses.

If the Court should be of opinion that a settlement was gained in the township of Melsonby, under the above case, then the order of sessions to be confirmed; if not, then to be quashed.

*Alexander* and *Bliss* in support of the order of sessions. The pauper gained a settlement in Melsonby by renting a tenement under the 1 *Will.* 4, c. 18, which enacts, that no such settlement shall be gained “ unless such house or building shall be actually occupied under such yearly hiring, in the same parish or township, by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same &c. shall be paid by the person hiring the same.” He occupied for more than a year, viz. from January, 1831, to October, 1832, and he occupied under a yearly hiring. Neither of these facts will be disputed, but it will be contended that the requirement of the statute with respect to the payment of rent has not been satisfied. But the pauper clearly paid the rent for a year. He paid 5*l.* in May-day and 5*l.* in Martinmas, 1831. It may be said that

1840.

The QUEEN  
v.  
Inhabitants of  
MELSONBY.



1840.

  
 The QUEEN  
 v.  
 Inhabitants of  
 MELSONBY.

the first 5*l.* was paid on behalf of *Merryweather*, who preceded him in the occupation. But the circumstances under which the pauper succeeded *Merryweather*, with the assent of the landlord, amounted to a surrender by operation of law. *Merryweather*, therefore, was no longer liable for rent in respect of his occupation; the pauper became liable for it, and therefore paid the 5*l.* in May, 1831, on his own account, and not as agent of *Merryweather*. Even without reference to the 5*l.* paid in May, 1831, the pauper paid rent “for the term of one whole year”—he paid 5*l.* in Martinmas, 1831, and 5*l.* for the succeeding half-year, through *Rhodes*, his successor, to whom he transferred his fixtures and furniture for the purpose of making such payment. Whether the pauper gave *Rhodes* money or money's worth for the purpose, or whether the landlord obtained the money by distress or voluntary payment, or whether the distress was regular, all these circumstances are immaterial. The result was, that the landlord received 10*l.* for a year's rent from the pauper, which is all that is essential. *Rex v. Pakefield (a)* will be relied on to defeat this settlement. There the pauper hired a house and lands from Michaelmas, 1832, to Michaelmas, 1833, and entered into occupation in Michaelmas, 1832. In July, 1833, he assigned to *W.* all his stock and effects in trust to cultivate the lands, to sell the stock, crops, &c. and to hold the proceeds in trust to pay the rent, taxes, &c. and then to pay creditors. *W.* sold in August, 1833, and afterwards paid the rent out of the produce. The pauper, by himself or family, occupied till Michaelmas, 1833. It was held, that the payment of rent was not such as to satisfy the 1 *Will.* 4, c. 18. But there the pauper had previously parted with his property for the payment of creditors generally; here the pauper had parted with his property for the specific purpose of paying the landlord, and the landlord was a party to the arrangement.

(a) 4 A. & E. 612; S. C. 6 N. & M. 16.

They referred also to *Rex v. Tadcaster* (a), *Rex v. Ormesby* (b), *Rex v. Stow* (c), *Rex v. Ramsgate* (d).

1840.

The QUEEN  
v.

*R. Ingham* (with whom was *S. Temple*) contra, was stopped. Inhabitants of  
MELSONBY.

LORD DENMAN C. J.—I think *Rex v. Pakefield* (e) is decisive of this case. The object of the statutes upon this branch of settlement was to simplify the law, and this the stat. 1 Will. 4, c. 18 has to a great extent accomplished.

WILLIAMS J.—I am of the same opinion. The sessions have been perplexed in this case by going into a question of constructive payment, and I think the statute was intended to get rid of such questions. The words in the statute, as to the payment of rent, are intelligible enough. In *Rex v. Pakefield* (a), the deed of assignment contained an express provision that the rent should be paid out of the proceeds of the pauper's property, but the Court would not adopt the maxim "qui facit per alium facit per se" with respect to payment of rent under this statute.

COLERIDGE J.—(After going through the facts of the case.) *Young*, the second landlord, had nothing to do with that part of the arrangement between the pauper and *Rhodes*, by which the pauper's goods were transferred to *Rhodes* for the purpose of paying the sum of 9*l.* 5*s.* When the goods were seized they were the goods of *Rhodes*. I think it cannot be said that there was a payment of 10*l.* rent in this case by the person hiring the tenement, so as to satisfy the statute.

Order of Sessions quashed.

- |  |   |
|--|---|
| (a) 4 B. & Ad. 703; S. C. 1 N. & M. 466. | <i>Rex v. Sturton</i> , 6 D. & R. 110.  |
| (b) 4 B. & Ad. 214; S. C. 1 N. & M. 27.  | (d) 6 B. & C. 712; S. C. 9 D. & R. 688. |
| (c) 4 B. & C. 87; S. C. nom.             | (e) 4 A. & E. 612; S. C. 9 N. & M. 16.  |

1840.

## The QUEEN v. JONES (a).

Under 55 Geo. 3, c. 68, s. 2, which enacts, that when it shall appear, upon the view of any two or more justices, that a highway is unnecessary, they may make an order to stop it up, an order stating, "We, A. and B. &c., having viewed &c., and it appearing unto us that such highway is unnecessary," does not shew that they acted upon their view, and is therefore insufficient.

**THIS** was a rule to shew cause why an order of justices, made at special sessions, for stopping up a highway, under 55 Geo. 3, c. 68, s. 2, should not be quashed.

The order stated that two justices for the county of Carmarthen, "having viewed a certain highway" (then followed a long description of the highway), "and it appearing unto us the said justices, that such highway is unnecessary, &c. we do hereby order that the said highway be stopped up," &c.

One of the objections to the order was, that it did not appear upon its face that the finding of the justices that the highway was unnecessary, was founded on their "view" of it exclusively, and that the order therefore was not good under the section above mentioned, which enacts that, "when it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway is unnecessary, it shall and may be lawful, by order of such justices, or any two of them, to stop up such unnecessary highway."

*Adams* Serjt. shewed cause, and contended that the case was within *Rex v. Milverton* (b) rather than *Rex v. Marquis of Downshire* (c).

*E. V. Williams* contra was not heard.

**LORD DENMAN C. J.**—In *Rex v. Milverton* (b) the words "having upon view found, and it appearing to us," were thought sufficient to shew that it appeared to the justices on the view that the road was unnecessary, but in *Rex v. Marquis of Downshire* (c), where the words were "having

(a) Decided during the term, & P. 179.  
Nov. 11. (c) 4 A. & E. 698; S. C. 6 N.  
(b) 5 A. & E. 841; S. C. 1 N. & M. 92.

iewed," &c. "and being satisfied" they were not though sufficient. I think the words in this order are not sufficient. The justices can easily take the words of the statute. In *Rex v. Milverton* (a) they did express the sense of the statute. Where words equivalent to those in the statute are used it will do, but I think it would be better always to take the very words. In *Rex v. Marquis of Downshire* (b) we thought the terms of the order consistent with the supposition that the justices were satisfied, quite independently of their own view, that the road was unnecessary, and the present order is consistent with the same supposition. That case was much considered, and is not distinguishable.

1840.  
  
 The QUEEN  
 v.  
 JONES.

WILLIAMS J.—I am of the same opinion. This case is governed by *Rex v. Marquis of Downshire* (b). In *Rex v. Milverton* (a) there was mere surplusage, which did not vitiate the order.

COLERIDGE J.—Both the cases cited concur in establishing the same point. It should appear unequivocally on the face of the order that the justices have viewed, and that they act upon their view. Proceedings before magistrates with respect to the stopping up and diverting roads require close watching, and, though it would be too technical to quash an order where the deviation from the words of the statute may be very trifling, yet we may lay it down that the words of the statute should be kept very closely to.

Rule absolute.

(a) 5 A. & E. 841; S. C. 1 N. & P. 179.

(b) 4 A. & E. 698; S. C. 6 N. & M. 92.

1841.

## HILARY TERM,

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA, 1841.

The Judges who usually sat in Banc this Term were,

Lord DENMAN C. J.

PATTESON J.

LITTLEDALE J.

COLERIDGE J.

In the Bail Court,

WILLIAMS J.

HILARY TERM, 4th *Victoria*.

It is ordered, that a party entitled to appear to a declaration in ejectment may appear and plead thereto at any time after service of such declaration and before the end of the fourth day of the term, in which the tenant is required by the notice to appear, in town causes; and before the end of the fourth day after the term, in which the tenant is required to appear, in country causes; and may proceed to compel the plaintiff to reply thereto, or may sign judgment of non pros. notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration: and that a plaintiff, who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a judge for leave to draw up a rule for judgment as of the time at which such rule for judgment would have been obtained.

(Signed)	DENMAN,	J. PATTESON,
	N. C. TINDAL,	J. GURNEY,
	ABINGER,	J. WILLIAMS,
	J. LITTLEDALE,	J. T. COLERIDGE,
	J. PARKE,	T. ERSKINE,
	J. B. BOSANQUET,	W. H. MAULE,
	E. H. ALDERSON,	R. M. ROLFE.

1841.

Tuesday,  
Jan. 12th.

## BROWNELL v. BONNEY.

**ASSUMPSIT** on a bill of exchange by an indorsee against the drawer. The plea traversed the notice of dishonour. The cause was tried before *Gurney B.* at Guildhall, after last term. No direct evidence was given of any notice of dishonour, but a witness proved that he had a conversation with the defendant on the subject of the bill in question, that he said to the defendant "I think you ought to pay;" that the defendant replied, "I have no other intention, and do not mean to avail myself of the informality of the notice." Upon the expression of the opinion of the learned judge that this statement was evidence from which might be inferred an admission of that liability which would arise on the due receipt of notice of dishonour, a verdict for the plaintiff was submitted to by the defendant, leave being given to move to enter a nonsuit.


*Crowder* now moved accordingly. An unqualified admission of liability may be evidence that every thing has been rightly done, but that inference does not arise in this case, the defendant at the same time that he expresses his intention to pay, declaring that the notice of dishonour was informal: *Taylor v. Jones (a)*. *Hicks v. The Duke of Beaufort (b)* is an authority that the promise should be clear and distinct. At the utmost a promise to pay is but evidence for the jury that the notice has been duly given. [*Patteson J.* referred to *Easterly v. Pullen (c)*.]

**Lord DENMAN C. J.**—I think this case comes within the authorities that a promise to pay amounts to an admis-

(a) 2 Camp. 105.

(b) 4 Bing. N. C. 232; S. C. 58cott, 598.

(c) 3 Stark. 186. See *Croxon*v. *Whitehall Worthen*, 5 M. & W. 5.

1841.  
  
 BROWNELL  
 v.  
 BONNEY.

sion that every thing has been rightly done to create the liability to pay. The defendant indeed alluded to the informality of the notice, but that allusion was much too vague to enable us to say that it meant a legally invalid notice. The admission taken altogether was evidence to go to the jury, and, if on the part of the defendant it was intended to have been said that the jury ought not to have presumed there had been a good notice, his counsel should have required that the opinion of the jury should have been expressly taken on the point. We cannot set aside the verdict on a suggestion of a probability that the jury would not have made the presumption.

LITLEDALE J. concurred.

PATTESON J.—I cannot say, if the question had gone to the jury and they had found a verdict for the defendant, that we should have set it aside, but it was undoubtedly evidence on which they might find a verdict for the plaintiff.

COLERIDGE J. concurred.

G.

Rule refused.



Friday,  
 January 22d.

A replication to a plea of payment into Court, that the defendant was indebted in a larger amount, omitting "and still is," is bad on special demurrer.

FAITHFUL and another v. ASHLEY.

DEBT for work and labour, &c. Plea, of payment of four pounds one shilling into Court in the usual form, alleging that the defendant never was indebted to a greater amount than the said sum. Replication, that "the defendant was indebted to the plaintiff in a greater amount, &c. Special demurrer, on the ground that the replication omitted the usual averment, that the defendant is still indebted.


*Lush*, in support of the demurrer, was not heard by the Court.

*Petersdorff* for the plaintiffs. The replication is good, and sufficiently fortifies the declaration. It is not obligatory on parties to follow the forms of pleading given in the rule of Court, it is sufficient if the rules of good pleading and the forms fixed by a general practice are observed. All pleadings subsequent to the declaration refer *primâ facie*, as to the allegations in it, to the time of declaring. The replication takes issue in the very words of the plea, and it cannot be required that in taking issue the replication should introduce a new and immaterial term. [*Patteson J.* The objection to the replication is that it does not carry on the allegations of the declaration.]

The Court (*a*) held the replication bad, as not following the form and appearing to avoid a proper issue.

G. Judgment for the defendant.

(*a*) Lord Denman C. J. *Littledale*, *Patteson* and *Coleridge* Js.

1841.  
  
 FAITHFUL  
 v.  
 ASHLEY.

### The QUEEN v. The Inhabitants of CHAWTON.

UPON an appeal against an order for the removal of *William Bone*, a pauper, from the parish of Chawton, in the county of Hants, to the parish of New Alresford, in said county, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court on the following case :—


“ Articles of agreement made and entered into this 9th day of December, 1829, between *Robert Waight*, of New Alresford, builder, of the one part, and *William Bone*, wheeler, of the other part. First, the said *Robert Waight*

*Monday,*  
*Jan. 25th.*  
 A pauper became tenant of premises under a written demise for the term of six months from the 1st of Jan. then next, and so on from six months to six months, until six calendar months' notice to quit by either party, at

the rent of &c. for every six months, the first payment to become due on the next 1st of July. *Held*, that the circumstances of the rent being payable at intervals of six calendar months, and of six calendar months' notice to quit being required, rebutted the presumption arising from the word “months” standing alone, and shewed that calendar months were meant; that the taking was therefore for one half year, and so from half year to half year as long as both parties should please, that such a taking was a law a taking for one year at least, and consequently there was a renting for one whole year within the meaning of the statute 6 Geo. 4, c. 57.



1841.

  
 The QUEEN  
 v.  
 Inhabitants of  
 CHAWTON.


agrees to let, and the said *William Bone* agrees to rent and take of him all that dwelling-house, &c. in New Alresford, with the appurtenances, for the term of six months from the 1st January next, and so on from six months to six months, until one of the said parties shall give to the other of them six calendar months' notice to determine the tenancy, at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st July, 1830, free of the payment of all rates and taxes. The said *William Bone* agrees to keep the premises in suitable repair (accidents by fire and tempest only excepted), being first made so by the said *Robert Waight*, and being allowed bricks, slate, lime, timber and sand for that purpose. The said *William Bone* is not to assign or underlet the premises without the consent, in writing, of the said *Robert Waight*, it being understood that the said *William Bone* may take lodgers whilst he occupies the premises himself. Witness our hands, &c."

Under this agreement the pauper entered into possession on the 1st of January, 1830, and continued to occupy the premises mentioned in it for several years; all the other requisites of the statute 6 *Geo.* 4, c. 57, were fully complied with, and the only question between the parties was whether under the above agreement there was a taking and renting of the tenement for one whole year, within the intent and meaning of the above statute. If this Court should be of opinion that such taking and renting were sufficient within the meaning of the said statute, then the order of sessions was to be quashed, if otherwise, to be confirmed.

*Rawlinson* in support of the order of sessions. The question is, whether this agreement gave the party an interest for "one whole year," so as to satisfy the statute. This was a taking for six months only, and the pauper might have quitted at the end of the first six months: *Harris v. Evans* (a), *Bacon's Abr.* (b), *Thompson v. Maber-*

(a) *Ambler*, 329.(b) *Leases*, L. 433.

*ey (a), Wilson v. Abbott (b). Doe d. Chadborn v. Green (c)* is certainly an authority in opposition to those cases, and if it be considered to overrule them, and to decide that this tenancy could not be determined until the expiration of the second period of six months, still that would be but a holding for twelve months, and as calendar months are not expressly mentioned, the ordinary rule must apply that lunar months were intended: *Rex v. Peckham (d), Lacon v. Hooper (e)*.

1841.  
  
 The QUEEN  
 v.  
 Inhabitants of  
 CHAWTON.

*Smirke* contra. The terms of this instrument shew clearly that calendar and not lunar months were intended. One circumstance is conclusive, the rent is reserved to be paid at periods of six calendar months, besides which the notice to quit is expressly required to be six calendar months (He was then stopped by the Court.)

LORD DENMAN C. J.—I think it is clear that in this agreement the term six months means half a year, and then a demise for one half year and so from half year to half year, as long as both parties should please, is a demise for a year.

LITLEDALE J.—The authorities shew clearly that a demise for a half year, and so from half year to half year would be a demise for one year at least, and the circumstances of the periods of the payment of the rent, and the length of time required in the notice to quit, sufficiently explain that calendar and not lunar months were intended.

PATTESON J.—*Primâ facie* the word “month” alone would mean a lunar month, but that ordinary presumption is here clearly rebutted.

COLERIDGE J. concurred.

G.

Order of Sessions quashed.

(a) 2 Camp. 573.

(c) 9 A. & E. 658; S. C. 1 P.

(b) 3 B. & C. 88; S. C. 4 D. & D. 454.

& R. 693.

(d) Carth. 406.

(e) 6 T. R. 224.

1841.

In the matter of *PEERLESS* and others.

Under the statutes 3 & 4

*Will.* 4, c. 53, and 4 & 5

*Will.* 4, c. 13,

those justices alone have

jurisdiction over offences

committed on the high seas,

who have jurisdiction

over "the places on

land," into which the per-

son committing such offence,

&c. "shall be taken, brought

or carried, or in which such

person shall be found."

Notwith-

standing the provisions, in

these statutes, that proceed-

ings shall be in the form or

to the effect of the forms in

the schedules, proceedings

are defective which state an

offence on the high seas, and

do not shew the fact which in

such cases will give the jus-

trices jurisdiction.

And if to a habeas corpus

a warrant so defective be

returned, and it does not

appear there is a conviction

supplying the defect, a prisoner committed un-

warrant will be entitled to his discharge.

**I**N the case of *George Peerless* a writ of habeas corpus had been granted, directed to *Thomas Nash*, an officer of customs, and to *Joseph Bone*, the gaoler or keeper of the house of correction at Maidstone, in the county of Kent, commanding them to bring up the body of the said *Peerless*. Like writs had been granted in five other cases of persons convicted at the same time with *Peerless*.

It appeared by the affidavits, upon which the writ of habeas corpus had been issued, that *Peerless* had been committed to gaol at Maidstone, after a conviction by the justices of the county of Kent, for an offence against the customs act, 3 & 4 *Will.* 4, c. 53; and that at the time of the information the defendants' attorney objected to the writ on the ground that it did not state that the alleged offence was committed within the jurisdiction of the justices of the peace for the county of Kent, and that such justices had any jurisdiction to hear and determine the matter thereof; and at the instance of the applicant for the writ the justices overruled the objection, and he agreeing that the defendants should have the full benefit of it at any future time, and that no attempt should be made to cure or remedy the defect by any subsequent amendment or alteration of any of the proceedings.

To the writ of habeas corpus the warrant of commitment returned was as follows:—

County of Kent, } To *Thomas Nash*, an officer of  
to wit. } customs, and to *Joseph Bone*, the  
keeper of the house of correction at Maidstone,  
county of Kent.

Whereas *George Peerless* has been duly convicted before us, *William Gladdish*, Esquire, and *Thomas Nash*, Esquire, two of her Majesty's justices of the peace

for the county of Kent, and it appearing that there is a conviction supplying the defect, a prisoner committed under the said warrant will be entitled to his discharge.

for the county of Kent, upon the information of *William Sawyers*, Esquire, officer of customs, for that he the said *George Peerless*, being a subject of her Majesty, on the 19th day of December, in the year of our Lord, 1840, was found on the high seas within one hundred leagues of the coast of the United Kingdom, to wit, the coast of the county of Kent, on board a certain vessel there, from which said vessel part of the cargo and lading thereof had been then and there thrown overboard to prevent seizure, contrary to the form of the statute in that case made and provided;

And whereas we the said justices did adjudge that the said *George Peerless* should for his said offence be imprisoned in the house of correction at Maidstone aforesaid, and then and there kept to hard labour for the term of six calendar months; these are therefore to require you the said *Thomas Nash* forthwith to take, carry and convey the said *George Peerless* to the house of correction at Maidstone in the said county of Kent, and to deliver him into the custody of the gaoler or keeper of the said house of correction: and we the said justices do hereby authorise and require you the said *Joseph Bone*, the gaoler or keeper of the said house of correction, to receive and take the said *George Peerless* into your custody, and keep the said *George Peerless* for the said term of six calendar months to hard labour. Given, &c.

This commitment was objected to, as not shewing any jurisdiction in the justices who committed the prisoner.

*Platt* now moved that the prisoners be discharged. The warrant of commitment is bad, in not shewing upon the face of it any jurisdiction in the committing justices over the charge brought against the prisoners. That charge is declared to be an offence by the statute 3 & 4 *Will. 4*, c. 53. The second section of that statute enacts, that certain vessels which shall be found to have been within specified distances of the coast of the United Kingdom having had on board certain goods of specified qualities and quantities shall be forfeited. The 48th section of the same statute enacts, that every subject of the crown found

1841.

In re  
PEERLESS.

1841.

  
In re  
PEERLESS.

on board a vessel so liable to forfeiture shall forfeit the sum of one hundred pounds. The 77th section shews in what justices the jurisdiction resides over the offences created by the statute. It enacts that any offence committed on the high seas shall be taken to have been committed at the place on land in the United Kingdom or Isle of Man, into which the person committing such offence or incurring such penalty or forfeiture shall be taken, brought or carried, or in which such person shall be found. "Provided always, that where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this act, be taken to have been committed upon the high seas." In the same section it is enacted, that either justices of any borough or liberty in which such land shall be situated, or justices of the county in which it is, shall have jurisdiction over the offence. By the 88th section it is enacted, that county justices shall have concurrent jurisdiction with borough justices when the offence is within the limits of the jurisdiction of the latter. And by the 88th section, when the attendance of two magistrates having jurisdiction in the county where the offence is committed cannot conveniently be obtained, it shall be lawful for one of such magistrates of any adjoining county to adjudicate. All these enactments shew but one intention as to jurisdiction (with the exception of the case provided for by the 88th section), that such justices shall adjudicate who have jurisdiction over the place where it was committed. Then there is an arbitrary enactment, the 77th, that offences on the high seas, as this by the commitment appears to have been, shall be deemed to have been committed where the offender shall be landed or where he shall be found. The jurisdiction ought therefore to appear by a statement of the fact at what place the offender was first brought to land or where he was found, in order that it may appear whether the justices adjudicating have juris-

diction over that place; *Kite and Lane's case*(a); *Ex parte Numm*(b). The stat. 4 & 5 Will. 4, c. 13, does not affect this question; it merely abolishes the pecuniary penalty, and directs the punishment to be at once imprisonment with hard labour. It will be urged that this commitment follows the form given by the statute; but the enactment (sect. 91) as to that merely is, that it shall be "in the form or to the effect in the schedule." The form given would be sufficient if it appeared as in ordinary cases that the offence was committed in a district over which the magistrates had jurisdiction. But here, if the magistrates had any jurisdiction, it was from special circumstances, and those special circumstances should appear.

1841.  
  
 In re  
 PEERLESS.

Sir J. Campbell A. G. and Wightman, contra. The commitment is sufficient. First, it does appear that these magistrates had jurisdiction, for in the 48th section of the stat. 3 & 4 Will. 4, c. 53, "the offender may be detained and carried before any justice of the peace of the United Kingdom." But the later stat. 4 & 5 Will. 4, c. 13, repeals so much of the former statute as relates to their adjudication upon this offence, and is an entirely new enactment, the 2nd section enacting, that the offender may be taken before "any two justices of the peace," and convicted by them, and sentenced to imprisonment with hard labour. [*Patteson, J.* The stat. 4 & 5 Will. 4 does not repeal the previous statute, except in relation to the punishment to be awarded.] Secondly. If those magistrates only have jurisdiction who have jurisdiction over the place in which the offence was committed, that need not appear on the face of the conviction. Both the cases cited were decided before the passing of the two acts on which the validity of this commitment depends, and a form is given by them, which has been followed, and which, having been prescribed by the legislature, is sufficient. The case of *Kite and Lane*(a)

(a) 1 B. & C. 101; S. C. 2 D. & R. 212.

(b) 8 B. & C. 644; S. C. 3 M. & R. 75.

1841.

~~~~~  
In re  
PEERLESS.

differs from this too in the material point, that it there appeared affirmatively that the magistrates had not jurisdiction.

*Platt* was heard in reply.

LORD DENMAN C. J.—It is not contended that the conviction in this case differs, in any material manner, from the commitment, in the statement of the jurisdiction, upon the objection to which the argument in this case depends. I agree entirely with the opinions expressed by Lord *Tenterden* and the other judges in *Kite* and *Lane's case*(a). “It is a first principle,” said Lord *Tenterden*, “as to all acts done by magistrates, that their jurisdiction should appear upon the face of their proceedings.” Then there is no enactment in the statute that the modified form of conviction or commitment given in the schedule shall be sufficient; but it is only required that the convictions shall be in the form or to the effect of that form which is given. The magistrates have no jurisdiction in this case except under the statute, and it therefore ought to appear that that case has occurred over which the act gave them jurisdiction.

LITTLEDALE J.—I think the prisoners are entitled to be discharged. The conviction is not brought before the Court, nor was it necessary for the prisoners to bring it before us. They have a right to have it shewn that there is a valid reason according to law for their detention in prison. I think the jurisdiction ought to appear on the face of the proceedings, and that it does not appear. I do not agree that the 48th section of the stat. 3 & 4 *Will. 4*, c. 53, gives jurisdiction to “any justices;” it merely authorises the officer to bring the offender on apprehension before “any justices,” that he may be detained and dealt with according to law. I do not think that section in any way governs this case. If the offence appeared to have been committed in the county of Kent, that might have

(a) 1 B. & C. 101; S.C. 2 D. & R. 212.

sufficient; but, as the justices had no primary jurisdiction they should shew the circumstances that invest them with it. I think the form given in the schedule was merely intended as an example of the form which might be used in all cases, but to be varied according to the circumstances of each case. Many blanks are left in the form, and directions for filling them up are given, and it is clear that it was not intended that the form should be adopted unaltered in all different cases which may occur under the statute. A different form would probably be required where the offender is committed in the county, another where he is brought within a third where one magistrate is called in to the assistance of another. I entirely concur in the judgment of *Tenterden* in *Kite* and *Lane's* case (a).

1841.  
  
 In re  
 PEERLESS.

ATKINSON J.—I have not the least doubt that the repeal in the latter act to adjudication by “any two justices” does not amount to a repeal of the earlier statute, as to the other points, the case falls obviously within the authority of *Kite* and *Lane's* case (a). If an offence is to have taken place in a particular county, of which the justices are, then *prima facie* they have jurisdiction. If the offence appear to have been committed on the high seas, which *prima facie* they have not jurisdiction, then the burden should be shewn from which the jurisdiction arises.

COLLIERIDGE J.—There ought to be a good legal warrant for a detainer in prison. On the face of it this is sufficient in shewing jurisdiction. On the other points I concur with the rest of the Court.

Rule absolute for the discharge of the prisoners.

(a) 1 B. & C. 101; S.C. 2 D. & R. 212.





1841.

Wednesday,  
January 30th.

## The QUEEN v. SHEPHERD.

The governor of a county house of correction occupied a house and garden within and parcel of the said prison. He was obliged by the rules of the prison to reside within the walls, and the accommodation provided was not greater than was necessary to enable him to do so, and perform his duties:—  
*Held*, that he was not liable to be assessed to the poor rate.

*Held*, also, that the matrons and turnkeys, occupying dwellings within the walls for the like purpose of the proper discharge of their duties, were not liable.

*Held*, that the justices were not liable to be rated in respect of the said prison, &c. in which work was done by the prisoners, partly for the use of the prison, and partly for hire, the produce being applied in

ON appeal by *Edward Shepherd*, keeper of the house of correction at Wakefield, against a rate for the relief of the poor, the Court of Quarter Sessions of the West Riding of the county of York ordered that the said rate be amended, by substituting the West Riding justices in the place of *John Tolson* and of all other persons, named in the said rate, as occupiers of houses or tenements within the said house of correction, except *Edward Shepherd*, and that the rate be in all other respects confirmed, subject to the opinion of this Court on the following case:

In the appeal of *E. Shepherd*, governor of the house of correction at Wakefield, in the West Riding of the county of York, against a rate or assessment made for the relief of the poor of the township of Wakefield, in the said Riding, in respect of a house and garden and other buildings within said house of correction, and being parcel thereof, the rate, as it originally stood, was in the following form:

| Names of Occupier.             | Name of Owner. | Description of Property.                         | Name and Situation of Property. | Rateable Value. |    |    | Rate at 6d. in the Pound. |    |    |
|--------------------------------|----------------|--------------------------------------------------|---------------------------------|-----------------|----|----|---------------------------|----|----|
| West Riding }<br>Magistrates } | West Riding    | Corn Mill, Two Tread Wheels, and Ten-horse Power | West Riding Prison              | £.              | s. | d. | £.                        | s. | d. |
| do. --                         | do.            | Seven Work Rooms and Warehouses                  | do.                             | 141             | 0  | 0  | 3                         | 10 | 6  |
| Tolson, John                   | do.            | Porter's Lodge                                   | do.                             | 51              | 0  | 0  | 1                         | 5  | 6  |
| Paige, James                   | do.            | House                                            | do.                             | 6               | 0  | 0  | 0                         | 3  | 0  |
| Shepherd, Mrs.                 | do.            | do.                                              | do.                             | 10              | 0  | 0  | 0                         | 5  | 0  |
| Shepherd, Edw.                 | do.            | House and Garden                                 | do.                             | 10              | 0  | 0  | 0                         | 5  | 0  |
| Parker William                 | do.            | House                                            | do.                             | 68              | 0  | 0  | 1                         | 13 | 0  |
| Peel, Benjamin                 | do.            | do.                                              | do.                             | 3               | 0  | 0  | 0                         | 1  | 6  |
| Ulliat, John                   | do.            | do.                                              | do.                             | 3               | 0  | 0  | 0                         | 1  | 6  |
| Lonsdale, Wm.                  | do.            | do.                                              | do.                             | 6               | 0  | 0  | 0                         | 3  | 0  |
| Flocton, Widow                 | do.            | do.                                              | do.                             | 6               | 0  | 0  | 0                         | 3  | 0  |
| Wilson & Clifford              | do.            | do.                                              | do.                             | 5               | 0  | 0  | 0                         | 2  | 6  |
| Binns, Mrs.                    | do.            | do.                                              | do.                             | 4               | 0  | 0  | 0                         | 2  | 0  |

The sessions amended the rate by striking out all the persons except *E. Shepherd*, mentioned as occupier in the first column of the said rate, and inserted the words "West Riding magistrates," instead thereof respectively, and con-


firming the rate so amended, subject to the opinion of the Court of Queen's Bench on the following case:

The magistrates of the said West Riding were assessed in the rate, as it originally stood, as occupiers of a corn mill, tread mill rooms, work rooms and warehouse, which are within and form part of the house of correction of their district. The tread mill, which is of  $7\frac{1}{2}$  horse power, is annexed to the corn mill, and both have been erected and are maintained for the purpose of employing the prisoners, and corn is ground there by them; part of it is ground there for hire, and produces 5*l.* or 10*l.* per year in money, but the greater part is ground for the use of the gaol, and is consumed within it. In like manner the work rooms and warehouses are used exclusively for the prisoners to work in. They make clothing there, and do all the blacksmith's work, joiner's work, bricklayer's work and washing required for the gaol. They also pick wool and oakum there for hire, and the women wash and sew for hire. The money earned amounts to about 480*l.* a year, and is paid over to the treasurer of the Riding, and goes in diminution of the expenses of the establishment. The expenditure over and above these earnings amounts to 5000*l.* a year, or thereabouts. There are within the gaol from time to time prisoners from the boroughs of Leeds and Doncaster. These boroughs, having no convenient prison of their own, pay the magistrates for the maintenance of their respective prisoners. The boroughs are respectively charged with the cost price of such maintenance, and the earnings of their respective prisoners are deducted from the amount the boroughs would otherwise have to pay for it. *E. Shepherd* is the governor of the said house of correction, and the house and garden for which he is assessed in said rate are both of them within and parcel of the house of correction. The house consists of ten apartments, nine of which are in the occupation of Mr. *Shepherd*, the tenth is used as a committee room for the magistrates. The house is in the centre of the gaol, and built on the panopticon principle, so as to be suitable for the occupation of the governor: as

1841.

The QUEEN  
v.  
SHEPHERD.

1841.

  
The QUEEN  
v.  
SHEPHERD.

such he is obliged by the rules to live always within the walls, and the accommodation provided for him is such only as and no more than is necessary for his convenient accommodation. The garden is rather more than half an acre in extent; it contains fruit, flowers and a greenhouse, and is chiefly used, the magistrates permitting it, by the governor; but it is not specially appropriated to his use, the object of such an area being the health of the prisoners, to which it is not only conducive but essential. This garden was used by the gaoler solely as a pleasure garden for his family. The several other persons, whose names are struck out, and in whose stead the magistrates of the West Riding are substituted, are matrons and turnkeys of the prison. By the rules of the prison these persons are obliged always to sleep within its walls, and it is absolutely necessary, for the safety and good conduct of the establishment, that they should do so. They occupy dwellings within the walls, and distinct from those of the governor. The accommodation they enjoy is provided for them by the Riding, and is no more than is necessary and convenient for the purposes for which they are placed there.

The questions for the opinion of the Court of Queen's Bench are, first, whether the said *E. Shepherd*, as such governor, occupying in the manner aforesaid, was liable to be rated in respect of the said house and garden.

Second, whether the several other persons, whose names were inserted in the rate as it originally stood, but struck out by the sessions, were liable to be rated in respect of the houses so occupied by them as matrons and turnkeys respectively.

Third, whether the magistrates of the West Riding, as such, are liable to be rated in respect of the said corn mill, tread-wheel rooms and ten-horse power, work rooms, warehouses, porter's lodge, dwelling houses and other premises, or any part thereof respectively.

The rate, as amended by the sessions, to be confirmed, amended or quashed, according as the Court shall adjudge upon the several points submitted to them.

*Dundas* and *Baines* in support of the order of sessions. It is settled that an occupation of property for public purposes is not sufficient to make it rateable, "but, as soon as any independent occupation is discoverable, rateability immediately attaches:" *Governors of Bristol Poor v. Wait* (a). This distinction runs through all the cases: *Rex v. St. Luke's Hospital* (b), *Rex v. Matthews* (c), *Lord Bute v. Grindall and another* (d), *Rex v. Hurdis* (e), *Rex v. Field* (f), *Rex v. Catt* (g), *Holford v. Copeland* (h), *Rex v. Terrott* (i), — *v. Armstrong* (k), *Rex v. Sparsholt* (l). It must be conceded that it is difficult to contend for the rateability of the justices, after the decision of this Court in *Rex v. The Justices of Worcestershire* (m).

1841.  
  
 The QUEEN  
 v.  
 SHEPHERD.

Sir J. Campbell A. G., Sir G. Lewin and Wortley, on the other side, were not called upon by the Court.

LORD DENMAN C. J.—I think these persons are clearly not rateable. They are compelled to reside in the gaol; it is their duty to do so, and it is found by the case that the accommodation provided is not greater than is necessary to enable them to reside and perform the duties for which they are placed there.

LITTLEDALE and PATTESON Js. concurred.

COLERIDGE J.—This case is very different from that of *The Governors of the Bristol Poor v. Wait* (a).

G. Rate to be amended, amended accordingly.

(a) 5 A. & E. 1; S. C. 6 N. & M. 383.

(b) 2 Burr. 1053.

(c) Cald. 1.

(d) 1 T. R. 338.

(e) 3 T. R. 497.

(f) 5 T. R. 587.

(g) 6 T. R. 332.

(h) 3 B. & P. 139.

(i) 3 East, 506.

(k) 2 Stark. 543.

(l) 4 A. & E. 491; S. C. 6 N. & M. 8.

(m) 11 A. & E. 57; S. C. 3 P. & D. 8.

1841.

Wednesday,  
January 13th.

In the exercise of its discretion the Court will in ejectment, as in other actions, grant a new trial upon payment of costs, and other equitable conditions, where the cause coming on unexpectedly has been tried as an undefended cause.

The Court will not require the payment of costs as between attorney and client.

The Court, in such a case, imposed as a condition, that the defendant should not set up an outstanding term.

DOE *d.* COOLING *v.* APPLEBY.

*BERE* obtained a rule to shew cause why, on payment of costs, there should not be a new trial had in this case. The rule was granted on affidavits that the cause had stood No. 18 in the cause list at the last assizes for the county of Somerset; that the cases preceding having gone off very rapidly the defendant was unprepared, and the cause taken as undefended.

*Barstow* shewed cause. This being an action of ejectment, in which the decision is not conclusive, the Court will not interfere, but leave the party to his remedy by another action. But, if the Court are disposed to make this rule absolute on terms, one of those terms ought to be payment of costs as between attorney and client: *De Rouffigney v. Peale* (a). [*Littledale J.* Why are we to exact these terms in this case more than in any other?]

*Bere* contra was not called upon.

Per CURIAM (b).—Rule absolute on payment of costs as between party and party.

*Barstow* having stated that it was apprehended on the part of the plaintiff, that the defendant intended to set up an outstanding term, the Court made it a condition of the rule that he should not do so.

G.

(a) 3 Taunt. 484.

(b) Lord Denman C. J., *Littledale*, Patteson and Coleridge Js.

1841.



Wednesday,  
January 13th.

The QUEEN v. STAMPER and another.

**INDICTMENT** against defendants, overseers of the poor of the parish of Nunnington, for disobedience of an order of a Court of Quarter Sessions to pay costs. Plea: not guilty.

At the trial before *Parke B.*, at the Yorkshire spring assizes, 1839, an order of sessions at Northallerton was proved, ordering the defendants to pay costs to *James Smith*. The order stated that the defendants had given notice to *Smith* of their intention to apply to the Court of Quarter Sessions for an order on him for the support of a bastard child, of which he was charged to be the putative father; that *Smith* duly appeared and resisted the order, and that the Court, on hearing the evidence, did not think fit to make any order upon him then, but ordered the defendants to pay *Smith's* costs, amounting to a sum of &c.

It was contended, on behalf of the defendants, that the order of the Court of Quarter Sessions was made without jurisdiction, as the defendants had not followed up their notice, by appearing to pray for an order on *Smith*. It was proved that, on the application of the defendants' attorney, an entry had been made in due time in a book kept by the clerk of the peace, containing the list of cases in which it was intended to apply to the Court for bastardy orders, and the usual fee was paid by him. The entry was, "No. 13, Nunnington.—*Smith*, attorney for complainants." That entry was made in obedience to the following order of sessions:—"Ordered, that, at the future quarter sessions, all applications intended to be made for orders of maintenance in bastardy be entered with the clerk of the peace on or before twelve at noon on Tuesday, in sessions, and no application will be received unless so entered, except on special application to the Court, and such application will be called on in the order of entry." The case was called

The overseers of a parish had given notice to a person of an intended application to the quarter sessions for an order on him as the putative father of a bastard child, under the stat. 4 & 5 Will. 4, c. 76, s. 72. The overseers, pursuant to the rules of the sessions, entered their intended application in a book kept for that purpose, but did not further appear to pray any order. The case was called on, and the defendant appeared. *Held*, that the entry was an application within the meaning of the statute, and that the calling on the case and appearance of the defendant were a hearing, and that therefore the quarter sessions had jurisdiction to award costs to the party intended to be charged as the putative father.

1841.

  
 The QUEEN  
 v.  
 STAMPER.

on according to the usual practice in its turn, but no one appeared in support of the application. *Smith*, who appeared, then applied for his costs, when the above mentioned order was made. The learned baron inclined to the opinion, that these facts amounted to evidence of an intended application, rather than of an application actually made and heard, within the meaning of the statute 4 & 5 *Will.* 4, c. 76, s. 73. He therefore directed a verdict of not guilty to be taken, reserving (by consent) leave to the prosecutor to move to enter a verdict of guilty. A rule nisi was obtained accordingly, against which

Sir *F. Pollock* and *Archbold* shewed cause. The Poor Law Amendment Act, 4 & 5 *Will.* 4, c. 76, s. 72, authorises the application to the Court of Quarter Sessions for an order of maintenance to be made upon the putative father of a bastard child. The 73d section prescribes the conditions of notice necessary to be observed to give that Court jurisdiction. No order can be made unless upon a hearing following a notice, of the intended application, given fourteen days before the sessions. At the end of the 73d section is the proviso under which it is said the Court had jurisdiction to make the order for costs, the validity of which is now in question. That proviso is, " Provided also, that, if upon the hearing of such application the Court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged, in resisting such application, shall be paid by such overseers or guardians. The question then resolves itself into this, did that which was done amount to a "hearing of such application?" It is true that the order professes on its face to be made upon " a hearing," but, as Lord *Ellenborough* said in *Welch v. Nash (a)*, " the justices cannot make facts by their determination, in order to give themselves jurisdiction contrary to

(a) 8 East, 403.

the truth of the case;" a doctrine which the Courts have fully confirmed in the later case of *Rex v. Gilkes* (a). Even if the order could, by an apt finding of a fact on its face, be held capable of, conclusively, giving jurisdiction, it cannot have that effect here, where the fact is merely stated by way of recital. "Neither doth a recital conclude, because it is no direct affirmation:" *Co. Lit.* 352 b. [Lord Denman C. J. That language must be understood with some qualification, or it would not stand with the decided cases. Here there is a direct affirmation of a fact (b).]

1841.  
  
 The QUEEN  
 v.  
 STAMPER.

*R. Alexander and Bliss* contra. This order of quarter sessions was a record, and the finding of the facts by it was not traversable (b): *Rex v. White* (c), *Rex v. Shipton* (d), *Rex v. Wade* (e), *Rex v. Mytton* (f). But, if it were traversable, the facts proved were sufficient to give the justices jurisdiction. The entry was an application. It was the first step according to the practice of the Court. That Court was quite competent to decide in what mode applications should be made to it, and, unless its regulations were evidently unreasonable, this Court will not interfere. The parties making the application might appear in Court and withdraw, but it would be not the less an application, and the Court would have power to award costs. The entry in the book was an application, and the calling on was a hearing. All these jurisdictions must be exercised

(a) 8 B. & C. 439; S. C. 2 M. & R. 454.

(b) It will be seen that the judgment of the Court did not proceed upon this part of the argument at all; but that, upon the facts of the case, what was done at the sessions did amount to a hearing, and therefore warranted the finding of the fact by the Court.

As to the doctrine of estoppel by recital, see *Shelly v. Wright*, Willes, 12. 1 Wms. Saund. 216, n. 2, "A party shall be estopped by the recital of a particular thing."

(c) Cald. 183.

(d) 8 B. & C. 772; S. C. 2 M. & R. 454.

(e) 1 B. & Ad. 861.

(f) Cald. 536.



1841.

The QUEEN  
v.  
STAMPER.

by analogy to the common law. [*Patteson* J. The entry of a cause at nisi prius enables the Court to nonsuit. The Court below seem to have considered the entry in the book was an application, that is very reasonable. The question is, does the statute warrant it? Under the 74th section, there may be a hearing though the defendant is not present, and why may there not be a hearing though the other party is not present?] The Court in construing the statute 17 Geo. 2, c. 38, held, in *Rex v. Justices of Essex* (a), that the quarter sessions could not give costs where an appeal had not been entered; but that decision proceeded upon the construction, put by the Court upon the statute, that there must be a determination of the appeal in order to give the sessions jurisdiction. And in *Rex v. Cawston* (b), where, after an appeal had been entered and respited, the respondents gave notice that they would not oppose the appeal, the Court held that the allowance of the appeal was a hearing and determination, and that the sessions might therefore award costs. In *Rex v. Justices of Essex* (c), *Parke* J., on the authority of these cases, said, it was clear the sessions had jurisdiction to award costs, in a case where an appellant, after his appeal had been entered, abandoned it, and gave notice to the respondents that he should not proceed with it, and when it was called on did not appear to support it. The terms of the statute in question in the cases cited were much more strict than in this act, which gives jurisdiction upon an application alone.

*Cur. adv. vult.*

LORD DENMAN C. J. in this term (Feb. 1st) delivered the judgment of the Court.—This was an indictment against the overseers of the township of Nunnington, in the North Riding of Yorkshire, for not obeying an order of sessions for payment of costs to one *James Smith*. The defendants

(a) 8 T. R. 583.

(b) 4 D. & R. 445.

(c) 1 Dowl. P. C. 539.

1841.

The QUEEN  
v.  
STAMPER.

given notice to *James Smith* of their intention to bring the sessions for an order on him as the putative father of a bastard child, under the 72d section of 4 & 5 c. 76. *Smith* had appeared at the sessions, but the defendants did not attempt to prove the case. The Court ordered costs to *Smith*, under the 73d section of the act. An order was taken for the defendants at the trial, with power to enter a verdict for the crown, if the Court should be of opinion that an application had been made and heard at the sessions, so as to give the Court jurisdiction to order payment of these costs. [His lordship then read the proceedings, as stated p. 539, *ante*.] The defendants made their application on the Tuesday in sessions, in breach of this rule, and it was called on in its order on Wednesday. The defendants did not then appear, nor make any application in open Court. *James Smith* attempted to resist the application.

His lordship was of opinion that the entry with the clerk of the Court in this case was an application within the meaning of the act of parliament, so as to give the court of sessions jurisdiction, and that the calling on of the case and appearance of *James Smith* to resist the application was a sufficient answer.

His lordship considered the rule of sessions as regulating the mode of making application to the Court, which being a matter of course, it was quite competent to them to regulate, and not merely directing a notice of intended application.

The court of sessions have evidently put this construction on their own rule, and we think it is the right one.

The rule must be made absolute to enter a verdict for the crown.

Rule absolute.



1841.



Wednesday  
January 15th.

In an action of assumpsit the defence was, that the plaintiff's testator and the defendant were partners, and that the subject matter of the action was a partnership account. To prove the partnership the defendant called for the production of an agreement, purporting to be made by a third person, K. with the plaintiff's testator and defendant as a firm, to do certain work for them.

Held, that on the production of it by the plaintiff the defendant was not entitled to read it without proof of its execution.

ELIZABETH COLLINS and another v. BAYNTUN.

**ASSUMPSIT** for money had and received. Plea, non-assumpsit. At the trial before Lord *Denman* C. J. at the London sittings after last term, it appeared that the plaintiffs sued as executrix and executor of a person named *Collins* deceased, and the defence was that the defendant was in partnership with him, and that the subject of this action was a partnership account. To prove that partnership, the defendant called for an agreement made, by himself and *Collins* as partners, with one *Kempster* a builder, to build and repair premises in which *Collins* and the defendant were to carry on business together as workers in horsehair. The plaintiffs produced it. The defendant offered to prove that work had been done under the contract. No evidence of the execution of the instrument was given, and the defendant contended that it was not necessary as the instrument came from the possession of the plaintiffs, and their testator had an interest in the agreement. The Lord Chief Justice rejected the evidence, and the plaintiff had a verdict.

*Jervis* now moved (a) for a new trial on the ground that the evidence had been improperly rejected. It must be conceded to be now settled that it is not sufficient to dispense with the proof of a written instrument that it comes from the possession of the opposite party, but it is sufficient, if he not only produces it, but claims an interest under it. The doctrine in *Rex v. Middlezoy* (b) is certainly qualified to this extent, *Carr v. Burdiss* (c). Here an interest was claimed, for if this agreement were not performed, *Collins* might have maintained a suit either at law or equity. The defendant was ready to prove that it had been acted

(a) Before Lord *Denman* C. J.  
*Littledale, Patteson and Coleridge*  
Js.

(b) 2 T. R. 41.

(c) 1 C. M. & R. 782.

**Coleridge J.** In *Pearce v. Hooper* (a) and in similar cases the party took an abiding interest.] not so in *Carr v. Burdiss* (b).

*Cur. adv. vult.*

1841.

COLLINS

v.

BAYNTUN.

**RIAM (c).**—The facts of this case are not sufficient within that exception, to the rule requiring proof of instruments, which depends upon the claim of the party made by the party producing it.

Rule refused.

int. 60.

M. & R. 782.

ry 23.

nerly held that the mere instrument comes out of the opposite party, it to dispense with proof *lex v. Middlezoy* (2 T. was said by *Buller J.* civil actions, where the shes to give in evidence the defendant's custody, the defendant notice to , and the deed when must *prima facie* be be duly executed, the plaintiff not knowing the subscribing witnesses be prepared at the trial the execution of the deed. an instrument coming hands of the opposite be taken to be proved." ne has been long over the present rule is stated s on Evidence, (8th ed. be that "where a party is a *beneficial interest* ed produces it under a is not entitled to insist execution being proved the attesting witnesses other manner, for, by

calling for the production of the deed, he is to be considered as affirming its due execution." There seems to be some mistake here, for the party producing the deed does not call for its production. But, passing over that, it seems to state the rule rather too broadly and vaguely. In all the cases on this subject, the deed, produced under notice, has been directly connected with the subject matter in dispute. As in *Pearce v. Hooper*, the leading case on the subject, where in an action of trespass the question was, whether the locus in quo was within the boundary of the plaintiff's estate, the plaintiff on notice produced the conveyance of the estate to him, and it was held that the defendant need not prove it, "The plaintiff," said *Mansfield C. J.*, "had no interest in the fee simple of this estate, if this deed does not convey it." So in *Burnet v. Lynch*, 5 B. & C. 589; S. C. 8 D. & R. 363, a lessee brought an action as assignee of the lease. To shew the covenants in the original lease he proved the counterpart. The defendant put in the original lease itself, and proposed to compel the plaintiff to prove it, but that

1841.  
COLLINS  
v.  
BAYNTUN.

was held to be unnecessary. *Bayley* J. said, "It was a deed under which the defendant and the party claiming under him had taken all the interest which they professed to take," In *Orr v. Morrice* (3 B. & B. 139); *Doe v. Heming* (6 B. & C. 28; S. C. 9 D. & R. 15); *Curr v. Burdiss* (1 C. M. & R. 784); *Bradshaw v. Bennet* (1 M. & Rob. 143); *Roe v. Wilkins* (4 A. & E. 86; S. C. 5 N. & M. G.

434) the instrument admitted without proof of execution was directly connected with the subject matter in dispute, and the title and interest of the party producing it in that very subject matter was shown to depend, at all events in some degree, on the validity of the instrument, which it therefore was unreasonable that he should call on the other party to prove.

STEAVENSON v. The Mayor and Corporation of BERWICK.


Payment of money into Court to indelbitatus counts is not an admission of any liability ultra the sum paid in, however special the particulars of demand may be.

**ASSUMPSIT** for work and labour as an attorney. Plea; payment of 52*l.* 1*s.* 3*d.* into Court, and no damages ultra; on which issue was joined. At the trial at Westminster, at the sittings in Easter term, 1836, a verdict was found for the plaintiff, subject to a case. It appeared from the case that the defendants contested their liability to the plaintiff. The particulars of the plaintiff's demand referred to an account from which it appeared that the plaintiff's demand was in respect of five different classes of business, viz.—

|                                                                                                          | £    | s. | d. |
|----------------------------------------------------------------------------------------------------------|------|----|----|
| 1st. A bill for defending two prosecutions and penalties paid for certain defendants convicted . . . . . | 269  | 5  | 3  |
| 2. A bill for prosecuting an action in King's Bench . . . . .                                            |      |    |    |
| 3. A bill for miscellanies respecting tolls belonging to defendants . . . . .                            | 4    | 5  | 11 |
| 4. A bill incurred in supporting the appointment of a public officer . . . . .                           |      |    |    |
| 5. A bill for auditing corporation accounts . . . . .                                                    | 5    | 18 | 4  |
| Amount . . . . .                                                                                         | £306 | 19 | 10 |

One of the questions argued was whether, by the payment of money into Court, the defendants had not admitted a liability by their retainer for the work, which was proved to have been done as set forth in the particulars.

*W. H. Watson*, for the plaintiff, cited *Ravenscroft v. Wise (a)*. [*Coleridge J.* Since that case the case of *Kingham v. Robins (b)* and *Stapleton v. Nowell (c)* have been decided in the Exchequer. They lay down a very different doctrine; and in the latter case *Alderson B.* says he thinks the case of *Kingham v. Robins (b)* must be considered to overrule the case of *Ravenscroft v. Wise (a)*. Lord *Denman C.J.* We have several times recognised and acted upon the doctrine that payment of money into court on indebtedness counts does not admit any liability beyond the amount paid in.]

1841.  
  
**STEAVENTSON**  
*v.*  
 The  
 Mayor, &c. of  
**BERWICK.**

*R. Ingham*, for the defendants, cited *Reed v. Dickons (d)*, *Long v. Greville (e)*, and *Seaton v. Benedict (f)*. [*Patterson J.* referred to *Cox v. Parry (g)*.]

The COURT (*h*) gave judgment for the defendants.

- |                                |                                             |
|--------------------------------|---------------------------------------------|
| (a) 1 C. M. & R. 203.          | R. 632.                                     |
| (b) 5 M. & W. 94.              | (f) 5 Bing. 28; S. C. 2 M. &                |
| (c) 6 M. & W. 9.               | P. 66.                                      |
| (d) 5 B. & Ad. 499; S. C. 2 N. | (g) 1 T. R. 464.                            |
| & M. 369.                      | (h) Lord <i>Denman C. J.</i> <i>Little-</i> |
| (e) 3 B. & C. 10; S. C. 4 D. & | <i>dale, Patteson and Coleridge Js.</i>     |
| G.                             |                                             |

**HARDEN** and another, Assignees of **FORSYTH**, an Insolvent,  
*v.* **FRANCIS FORSYTH.**

Thursday,  
 January 21st.

**RULE** to shew cause why the judgment signed on a warrant of attorney, with all subsequent proceedings, should not be set aside for irregularity, the defendant having died before the judgment was signed.

A warrant of attorney had been given by an insolvent debtor to the provisional assignee, pursuant to the stat. 7 Geo. 4, c. 57, s. 57. After

On the 26th March, 1827, *Francis Forsyth* was discharged by the Insolvent Court. He had executed, pursuant to the death of the insolvent, by order of the Insolvent Debtors' Court, judgment was signed upon it. The Court set it aside as irregular.

The Court afterwards refused a rule to enter up judgment nunc pro tunc as of a period anterior to the death of the insolvent.

1841.

  
HARDEN  
v.  
FORSYTH.

suant to the stat. 7 *Geo.* 4, c. 57, s. 57, a warrant of attorney to confess judgment, at the suit of the provisional assignee, for the sum of 5070*l.* The plaintiffs were afterwards appointed assignees. *Francis Forsyth* died Aug. 30, 1833, leaving executors.

Dec. 24, 1839, an order was obtained to enter up judgment on the warrant of attorney, at the suit of the plaintiffs, for the sum of 2536*l.*, the then unsatisfied debts of *Francis Forsyth*. Judgment was accordingly signed in this Court, but without any application for a rule or order to do so. Application was made to the Insolvent Court for leave to take out execution on the judgment, and, on May 24, 1840, the court ordered that execution might be taken out, but in order to ascertain the validity of the proceedings, that court stayed them, directing an application to be made to this Court.

Sir *J. Campbell* A. G. and *Hoggins* now shewed cause. The Insolvent Debtors' Court alone has jurisdiction in this question. The stat. 7 *Geo.* 4, c. 57, s. 57, which was the statute in force at the time these proceedings were taken, gives jurisdiction to the Insolvent Debtors' Court to direct in what manner judgments against insolvent debtors shall be entered up and enforced. It enacts that the order of the court for entering up judgment shall be a sufficient authority to the officer who is to enter the same, and the court are authorised to allow execution to be taken out upon the judgment. The statute intended that the warrant of attorney should continue in force, notwithstanding the death of the insolvent. The language of the section as to taking out execution is, "and if at any time it shall appear to the satisfaction of the said court that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the said court may permit execution to be taken out upon such judgment." [*Patteson* J. That provision relates to issuing execution, and not to signing judgment.] Even at com-

on law it is not always an objection to a judgment that it is signed after the death of the defendant. The practice of entering up judgment on an old warrant of attorney is an instance. It was sufficient if the defendant was alive on the first day of term, though the judgment was signed in the course of the term.

1841.  
  
 HARDEN  
 v.  
 FORSYTH.

Sir *W. W. Follett* and *W. H. Watson* *contra* were stopped by the Court.

LORD DENMAN C. J.—The 57th section of the statute does not, as I at first thought it did, give any power to the Court to order judgment to be entered up after the death of the defendant. The rule therefore must be absolute.

LITLEDALE J.—It is clear that judgment cannot be entered up against a party after he is dead, unless it be done as of a time preceding the death. The Court sometimes permits judgment to be signed *nunc pro tunc* where the delay has been the act of the Court, as in cases of lapse of time after a special verdict, the defendant having died in the interim, and other similar cases.

PATTESON J.—This is a judgment of our Court, and we have therefore clearly jurisdiction over it; and we must see that the proceedings of this Court are regular. I am of opinion that the statute cited gives no power to the Insolvent Debtors' Court to enter up judgment after the death of the insolvent.

COLERIDGE J.—The practice on signing judgments on old warrants of attorney furnishes no argument in favour of the plaintiffs. Under the old practice the whole term was considered to be as one day; everything done had relation to the first day of the term; it was sufficient to shew that the defendant was alive on that day. Now that judgments bear date on the day they are actually signed, it



THE  
 ———  
 LITIGATION  
 .  
 FURTHER

IT WAS NECESSARY TO SHOW THAT THE DEFENDANT WAS ALIVE SO RECENTLY  
 BEFORE THE APPLICATION AS TO RAISE AN INFERENCE THAT HE IS  
 STILL ALIVE. SO THAT UNDER BOTH THE OLD AND THE ALTERED  
 PRACTICE THE COURT REQUIRED TO BE SATISFIED, BEFORE THEY AU-  
 THORIZED A JUDGMENT TO BE SIGNED, THAT THE PARTY WAS LIVING  
 AT THE TIME OF THE MOTION. THE CASE WAS BEFORE ME AT  
 CHANCERY: I REFERRED IT TO THE COURT, THINKING THE CONSTRU-  
 CTION OF THE CASE REPOSED ON A FIT SUBJECT FOR CONSIDERATION.

Rule absolute.

SIR J. CAMPBELL A.G. afterwards (Jan. 25) applied to the  
 COURT for leave to enter up judgment nunc pro tunc as of  
 a TERM ANTERIOR to the death of the insolvent. [Coleridge J.  
 In ordinary cases this Court is not to be applied to, but  
 the Insolvent Debtors' Court.]

*Cur. adv. vult.*

THE COURT this day (Jan. 28) refused a rule.

G.



Wednesday,  
 January 28th.

THE QUEEN v. HOPKINS and others.

A writ of  
 mandamus  
 commanded a  
 person to de-  
 liver up to the  
 clerk of a  
 court of re-  
 quests papers  
 relating to the  
 office. The  
 writ did not  
 shew any  
 claim by the  
 person de-  
 taining to hold  
 them under  
 any right.

Held, that the  
 writ was  
 therefore bad,

and that the defect could not be supplied by the return, on which it appeared that he  
 claimed to be the lawful clerk of the court, and to retain the papers as such.

MANDAMUS to deliver up books and papers relating to  
 the office of clerk of the court of requests, established  
 under stat. 47 Geo. 3, sess. 2, c. 1, for the recovery of small  
 debts in Boston and two other hundreds of the county of  
 Lincoln. The writ, which was directed to *Hopkins* and to  
 the commissioners of the court, set out the mode of election  
 to the office of clerk of the same court prescribed by the  
 statute, and alleged that *Meaburn Staniland* had been duly  
 elected on a vacancy occasioned by the death of the preceding  
 clerk. The writ then proceeded, "and whereas we have  
 further been given to understand and be informed that  
 divers books, papers, and other proceedings relating to the

said court of requests, or to the business thereof, or to the said office of clerk to the said court, and which of right ought to be in the custody of the said *Meuburn Staniland* as clerk to the said court of requests, are now in the custody, power, or controul of you, the said *Thomas Hopkins*, and you the commissioners of the said court of requests or of some of you," &c.—the writ then alleged a demand by *Staniland* of the books, papers &c., and a refusal by *Hopkins* and the commissioners to give them up. The writ then commanded them to deliver to *Staniland*, "as such clerk to the said court, all books, papers, and other proceedings relating to the said court, or the business thereof, or to the office of clerk to the said court, or that you shew us cause, &c."

1841.  
  
 The QUEEN  
 v.  
 HOPKINS.

The commissioners returned traversing the possession of any books &c.

*Hopkins* made a return traversing the validity of the election of *Staniland*, and setting up an election of himself to the office of clerk of the said court, and that he received by order and direction of the said commissioners the books, papers, and other proceedings relating to the said court, to the business thereof and to the office of clerk of the said court and business thereof, and to the office of clerk of the said court, in the within writ mentioned; and that at the time of the serving of the said writ on him, he held and still holds the same as above he was entitled. Wherefore he could not deliver &c.,

Sir *W. W. Follett* intimated that an objection would be taken to the writ, for not shewing on the face of it that *Hopkins* was not possessed of the books &c., otherwise than as a mere stranger.

Sir *F. Pollock* for the crown. A mandamus will lie to any one who claims to hold documents in right of his election to a public office, or documents of a public nature. When two persons are contending for an office, the right to it may always be tried by a mandamus to give up papers relating to it, when quo warranto would not lie. [*Littledale J.*

1841.

The QUEEN  
v.  
HOPKINS.

The writ itself does not shew *Hopkins* had anything to do with the office ; why might not trover be maintained ?] In trover he could only recover damages. It must be contended that he is not a mere wrong doer, but that he holds under some claim of right connected with the office, which alone could give him any title to hold them. At all events as a return is now made, there is sufficient before the Court to enable them to exercise their discretion whether the writ should go or not. [*Littledale J.* The Court did not direct the writ to issue in that form.]

Sir *W. W. Follett* for *Hopkins* contra. The writ of mandamus itself does not shew any ground for the interference of the Court, and, if that be so, the defect cannot be remedied by any thing contained in the return. There is no statement of any claim by *Hopkins* to hold those documents as a matter of right—nothing to shew that he is not a mere stranger to these proceedings against whom trover or detinue might be supported. This is not like the case of *Rex v. Round (a)* where a person whose term of office had expired detained the official papers from his successor. [*Cotteridge J.* referred to *Rex v. The Bank of England (b).*]

LORD DENMAN C. J.—The objection appears to be well founded. The practice of this Court is uniform, not to consider the issuing of this writ to be a mere matter of discretion, but to require a clear case to be made out for the extraordinary interposition by the Court, and this ought to appear on the face of the writ itself.

(a) 5 N. & M. 427.

(b) There are two cases of this name, and both in point. One case is in 2 Doug. 526, where Lord *Mansfield* said “where there is no specific remedy, the Court will grant a mandamus that justice may be done. But where an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is

not clear, the Court will not interpose the extraordinary remedy of a mandamus.” The learned judge probably referred to another case of the same name in 2 B. & Ald. 620, where *Bayley J.* said, “The Court never grants this writ except for public purposes, and to compel the performance of public duties.”

LITTLEDALE, PATTESON, and COLERIDGE Js. concurred.

G.

Writ of mandamus quashed.

1841.

The QUEEN  
v.  
HOPKINS.

The QUEEN v. The Overseers of the TODMORDEN  
UNION.


Saturday,  
Jan. 23rd.

**MANDAMUS.** The writ stated the formation of an union, pursuant to the provisions of the Poor Law Amendment Act, comprising the township of Todmorden and Walsden, "and that under the provisions of the said act, and under the rules, orders and regulations of the Poor Law Commissioners for England and Wales, certain persons had been duly appointed guardians of the poor in the said union, and as such guardians had taken upon themselves the maintaining, providing for, regulation and employment of the poor of the said union, including the poor of the said township of Todmorden and Walsden." The writ then stated an order of the Poor Law Commissioners that the board of guardians of the said union should give the necessary directions to the overseers of the poor of the several townships and places in the union for providing such sums as might be requisite for the relief of the poor of such townships and places, and for defraying proportionably the expenses of the union, and that they should make and collect the necessary rates, and pay them over.

The writ also, among other things, stated the issuing of a precept by the guardians to the overseers of the township of Todmorden, requiring them to pay the several sums of 50*l.*, 40*l.* and 50*l.* out of the poor rates of the parish of Todmorden, for the relief of the poor in the union, and for their proportion of the general expenses; and, stating their neglect and refusal to do so, commanded them to pay the said sums to the treasurer of the Todmorden union, or, if necessary, to make a rate to raise such sums.

On the formation of a poor law union, one parish altogether neglected to elect any guardian. There were two elections of guardians after the first, and at those also the same parish neglected to elect any guardians. *Held*, that, even if at the first election the board of guardians was incomplete, the defect was cured by the 38th sect. of the Poor Law Amendment Act, which gives validity to a board elected subsequently to the first election, though the full number of guardians be not elected. *Semble*, that the board was a good board even the first year.

1841.

  
The QUEEN  
v.  
The Overseers  
of the  
TODMORDEN  
UNION.

The overseers in their return, admitting *seriatim* the allegations in the writ of mandamus, alleged that a township, parish or place, called Langfield, formed a part of the Todmorden union, and that the said union, "besides the said township of Todmorden and Walsden," and the said township, comprised" four (naming them) other townships, parishes or places. The return then stated an order of the Poor Law Commissioners that the number of guardians for the said union should be eighteen, to be elected by the several townships, parishes or places comprising it, in certain proportions specified; Todmorden and another place electing four, two other places electing each three, and the remaining townships, parishes or places, in which number was included Langfield, electing each two. The return then stated that guardians had been duly elected and appointed for all the parts of the union except Langfield, for which township there never had been any guardian elected.

The plea to the return, protesting the validity of it in law and admitting the facts in it, alleged, that the said order for the formation of the said union in the said writ and return mentioned was and is a certain order of the said Poor Law Commissioners made by them under and in pursuance of the said act of parliament and issued by them, 28th January, 1837, for the uniting, &c. of the said places named, and directing the constitution of a board of guardians for the said union, specifying the number of guardians, and the days for their election. The plea then stated that on the day fixed for the first election "certain guardians to the number of three or more, to wit, ten, were duly elected and appointed, under and by virtue of and pursuant and conformably to the provisions of the said act of parliament, intituled &c.;" that before the election due notice in writing was given to the inhabitants of Langfield, but that notwithstanding such notice they did not elect any guardians. The plea then alleged two subsequent annual elections of guardians, at each of which three or more, to wit, ten, were elected, but none by the township

of Langfield. It also alleged that the board of guardians thus constituted did act as such and made the orders, the non-compliance with which was complained of.

The replication to the plea stated the circumstances under which Langfield had not elected any guardians. Demurrer.

1841.


The QUEEN  
v.The Overseers  
of the  
TODMORDEN  
UNION.

Sir J. Campbell A. G. for the crown. It is to be contended by the defendants that there has never been a valid election of a board of guardians at all, in consequence of the neglect to elect any by the parish of Langfield. The validity of the objection depends on the construction which ought to be put upon the 38th section of the Poor Law Amendment Act. Unions framed under that statute differ materially from those formed under *Gilbert's* act, 22 G. 3, c. 83. Under the former the several parishes form a representative and not a federal union, and, if a parish having the opportunity duly to elect its representative neglects to do so, that cannot invalidate the representative body. *Rex v. The Poor Law Commissioners* (a) decides that even a parish already under the regulations of a local act may be made part of an union, though the commissioners would have no power to make orders inconsistent with the provisions of such act. That decision shews that it is not essential that the whole should be united into one body, alike in all its parts. Other sections of the act shew that the legislature did not contemplate the presence or sanction of all the guardians as a condition to the validity of a quasi corporate act. Section 32 requires the consent of two-thirds of the guardians of an union to a dissolution of it. Section 38, provides that no act of a meeting of guardians "shall be valid unless three members shall be present and concur therein."

*Kelly* contra. There has never been a complete body of guardians formed, and the orders of the guardians who have been elected have therefore no validity. This is shewn

(a) 6 A. & E. 34; S. C. 2 N. & P. 8.

1841.

  
The QUEEN  
v.  
The Overseers  
of the  
TODMORDEN  
UNION.


by the language of the several sections of the act. This is not the case of a vacancy occurring after the whole body of the guardians had been duly elected, or of a failure to elect by a parish at an election subsequent to the first: in those cases, by the express words of the 38th section, the remaining guardians may act "as if no such vacancy had occurred, and as if the number of such board were complete." These expressions shew that, except in the case provided for, the board cannot act "unless the number be complete," which it has here never been. Further, there is a provision in the same section which directs how the guardians shall be elected, indicating, or rather plainly declaring, the same intention, "provided always that one or more guardians shall be elected for every parish included in such union." [*Patteson J.* Do you contend that if each parish had elected one guardian, the board would have been complete, though the order had been to elect a larger number for each parish?] The clause may not shew that, but it shews the intention. There are many acts by the guardians, to the validity of which it is made necessary that there should be a concurrence of a majority of two-thirds; would a majority of two-thirds of an incompletely elected board be sufficient? A similar difficulty arose in the construction of the stat. 5 & 6 *Will.* 4, c. 76, regulating the first election of aldermen for a borough, and it was removed by an act of the legislature, 7 *Will.* 4 & 1 *Vict.* c. 78, s. 2. *Rex v. W. L. Roberts* (a).

Sir *J. Campbell* A. G. in reply. The point arising upon the statute 5 & 6 *Will.* 4 did not receive any judicial determination. Doubts, as recited in the latter act, were entertained, and to remove them the legislature interfered.

Lord DENMAN C. J.—The 38th section of the statute is very obscurely expressed; but I think that the meaning of the legislature is that contended for by the Attorney-

(a) 7 Ad. & E. 433; S. C. 3 N. & P. 295.

eneral. The direction in the proviso, that one or more guardians shall be elected, must mean that one or more shall be made eligible by the order of the commissioners. I say so rather as a matter of opinion, because by the subsequent enactment the defect, if it be one, is cured. Supposing the first election altogether bad, still the statute provides that "in case the full number of guardians shall not be fully elected at such subsequent election of guardians at the time being, the other or remaining members of the said board shall continue to act until the completion of the said board" "as if the numbers of such board were complete." There have been elections for several years, and the defect is therefore cured, unless we are to say "subsequent elections" mean elections after a first complete election; but there is nothing to authorise such an interpretation.

1841.  
  
 The QUEEN  
 v.  
 The Overseers  
 of the  
 TUDMORBEN  
 UNION.

LITLEDALE J.—I also am of opinion that in this case there was a "subsequent election" within the meaning of the act, and a deficiency in the election is by it expressly provided for.

PATTESON J.—I think the proviso, as to the number of guardians to be elected for each parish, coming after the regulations of the powers of the commissioners, must be referred to them; but at all events this is a case of a subsequent election.

COLERIDGE J.—The commissioners are to "determine the number of guardians to be elected in each union:" that must mean the number that shall be directed to be elected. I cannot resist the inference that the proviso that one or more shall be elected for each parish must have the construction that the commissioners shall direct one or more to be elected for each parish. I agree too with the rest of the Court, that, if that be not so, this is the case of a subsequent election, to which the objection does not apply.

G. Judgment for the crown.



1841.

## In re EASTON (a).

1. A writ of habeas corpus ad subjiciendum, &c., granted by a judge of the Queen's Bench, must issue from the crown side of the Court, where the prisoner is in custody for a criminal matter.

2. Where a prisoner committed to custody for a criminal offence sued out a writ of habeas corpus from the plea side of this Court, and obtained his discharge on the ground that the warrant of commitment was defective:—

*Held*, that the solicitor for the crown, who had opposed his discharge without then objecting that the writ had irregularly issued, had thereby waived the objection, and

that he could not afterwards set aside the writ for irregularity.

3. By 3 & 4 *Will.* 4, c. 53, s. 48, a person found on board a vessel liable to forfeiture is to forfeit 100*l.* By 4 & 5 *Will.* 4, c. 13, s. 2, imprisonment for six or nine months, with hard labour, on "conviction" is substituted for the former pecuniary penalty:—*Held*, that a party imprisoned under this act was in custody for a "criminal matter" within the meaning of 56 *Geo.* 3, c. 100; and that a habeas corpus ad subjiciendum, obtained on his behalf from a judge of the Queen's Bench, should issue from the crown office.

*ELLIS*, in Hilary term, 1840, obtained a rule (b) calling upon *Easton* and his attorney to shew cause why a writ of habeas corpus issued out of this Court by his said attorney on the 12th December, 1839, and whereby the gaoler or keeper of the house of correction, at the town and county of the town of Southampton, was commanded to have the body of *Easton* before one of the judges of this Court ad subjiciendum, &c. should not be set aside for irregularity, and why an order made by *Patteson J.* on the 16th December, 1839, for discharging the said *Easton* should not be rescinded, and why a warrant should not issue to retake him.

The rule was obtained on the ground that the writ had issued from the plea side of this Court instead of from the crown office.

It appeared that on the 26th November, 1839, *Easton* had been convicted by the Southampton magistrates, and sentenced to imprisonment for being on board a vessel liable to forfeiture within 4 & 5 *Will.* 4, c. 13, s. 2, the said vessel being a foreign vessel, &c. within eight leagues of the coast, &c. and having on board casks of brandy of a prohibited size. On the 16th December following he was brought under the writ of habeas corpus before *Patteson J.* at chambers. The solicitor to the customs attended on the part of the crown. Several objections were taken by *Easton's* attorney to the warrant of commitment. The learned judge held one of the objections to be good, and

(a) Decided in Michaelmas term last (Nov. 9th).

(b) On Jan. 21st, in the Bail Court.

directed the prisoner to be discharged. It was not discovered until the 20th December that the writ had not issued from the crown office, and on the same day application was made to *Patteson* J. at chambers, and an escape warrant was granted by the learned judge to retake the prisoner, on the ground that the writ had not issued from the proper office, and a summons was also granted to shew cause why the order for his discharge should not be rescinded. The prisoner was not retaken; and his attorney and the solicitor for the customs attended the summons by consent on the 2nd January. The learned judge having heard both sides, directed, on the 6th January, that the escape warrant should be recalled.

1841.

~~~~~  
In re  
EASTON.

*Platt* and *M. Smith* shewed cause. [Sir *J. Campbell* A. G. The latter part of the rule as to retaking *Easton* has become immaterial, because the period of imprisonment to which he was sentenced has expired; but it is important to have the question of practice settled, which is, whether, where a party is imprisoned for an offence against the 2nd section of the Customs Act, 4 & 5 Will. 4, c. 13, he can obtain a writ of habeas corpus from the plea side of this Court, instead of from the crown office.] 1. There was no irregularity in the issuing of the writ. The writ issued at common law, and nothing more was necessary to its validity than the fiat of the judge who issued it: 3 Bl. Com. 131. No distinction is there made between the mode of issuing the writ in civil and criminal cases; nor in the statutes of 31 Car. 2, c. 2, and 56 Geo. 3, c. 100, by which no other formality is required than the seal of the Court to which the judge belongs who issues the writ. Indeed these statutes could not be carried into effect if the distinction were to prevail, for then the writ could not be issued by a judge of the Common Pleas, as that Court has no crown side.

But, even if the writ must in criminal matters issue from the crown side only, the matter for which *Easton* was sen-

1841.

~~~~~  
In re  
EASTON.

tenced to imprisonment was not a criminal matter. The statute 4 & 5 *Will.* 4, c. 13, s. 2, under which he was convicted, enacts that persons found on board vessels having prohibited lading, within prohibited distances, and persons obstructing the officers of the preventive service, &c. "shall, upon being duly convicted of any of the said offences before any two justices of the peace, be adjudged by such justices for the first offence to be imprisoned in any house of correction, and there kept to hard labour for any term not less than six nor greater than nine calendar months," &c. In this section, the matter of which *Easton* was convicted is called an "offence," and it is visited with imprisonment as if it were a criminal offence; yet by the former enactment, 3 & 4 *Will.* 4, c. 53, s. 48, for which the present is substituted, the only penalty was a pecuniary penalty of 100*l.*; and an alteration in the penalty cannot vary the character of the offence. *Ex parte Beeching* (a) is decisive to shew that smuggling is not a criminal matter.

2. Even if this writ ought to have issued from the crown office, it is not void, and the irregularity has been waived, for it was passed over when the crown attended by its solicitor before *Patteson* J. at chambers, and was not mentioned until after the learned judge had disposed of the case, and discharged the prisoner.

*Sir J. Campbell* A. G. and *Ellis*, contra. The irregularity has not been waived; for it was objected to as soon as discovered.

It is not denied, on the part of the crown, that the prisoner had a right to his habeas corpus, but it is contended that he should have obtained it from the proper office. A habeas corpus cum causâ may of course be had on the plea side of the Court, but a habeas corpus ad subjiciendum, where a party is in custody at the suit of the crown, must always be had from the crown office. The offence

(a) 4 B. & C. 136; S. C. 6 D. & R. 209.

for which *Easton* was committed was clearly a criminal offence, and the whole language of 4 & 5 Will. 4, c. 13, s. 2, shews that the legislature considered it to be so. The nature of the act in itself, which a party is charged to have committed, is immaterial; whether the act is criminal or not must depend upon the way in which it is treated by the law. The act now in question is a criminal act, because the statute treats it as a criminal act by punishing it as such. If for the same act *Easton* had been liable merely to an action of debt for a penalty, the case would be different, and this distinction is taken in *Huntley v. Luscombe* (a), but the point was not decided. The case of *Ex parte Beeching* (b), which has been cited, was a proceeding for penalties, and therefore does not apply. If the statute of 4 & 5 Will. 4 had simply prohibited the act of which *Easton* has been convicted, he would have been liable to indictment. [Lord Denman C. J. We think this was a criminal matter.] Then *Taylor's* (c) case is a direct authority that the writ should have issued from the crown side of this Court. In that case the Court appeared to consider it of importance that the distinction, as to the mode of issuing writs of habeas corpus on the crown and civil side of the Court, should be preserved.

LORD DENMAN C. J.—We are all of opinion that the prisoner was in custody for a criminal offence. Whatever may have been the provisions in former acts with respect to the offence for which he was committed, we think that, as the act now applicable to it says that a party convicted of it shall be imprisoned and kept to hard labour, it is impossible to doubt that the offence is, in the eye of the law, a criminal offence. The regular course therefore would have been to have issued the habeas corpus from the crown side of the Court: that was decided in *Taylor's* case (c). There has been then an irregularity in issuing this writ,

(a) 2 B. &amp; P. 530.

(c) 3 East, 232.

(b) 4 B. &amp; C. 136; S. C. 6 D. &amp; R. 209.

1841.

~~~~~  
In re  
EASTON.

and it might easily have been ascertained that it had not been duly issued. Yet a step has since been taken notwithstanding. We think the customs must be considered to be the adverse party who have taken that step, and that they have thereby waived the irregularity.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.



January 12th.

DOE *d.* BLEWITT *v.* PHILLIPS.

Land, with timber on it, was sold and conveyed by tenant for life, without impeachment for waste, under the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 51). By s. 98 the purchase money is required to be paid into the Bank; and by s. 119, *after such payment*, the sale is declared valid. The purchase money for the land was so paid in, but that for the timber was paid to the tenant for life, who applied it to his own purposes: — *Semble*, such sale was invalid under s. 119.

**EJECTMENT.** The cause came on for trial at the Monmouthshire summer assizes, 1838, when a verdict was entered for the lessor of the plaintiff by consent, subject to the following special case :

Major *Edward Blewitt*, being tenant for life without impeachment of waste, but in strict settlement, with remainder to his son *Edward Francis Blewitt*, the lessor of the plaintiff, in tail male, of large landed estates in the county of Monmouth, and among others of the farm and lands hereinafter next mentioned, on the 6th January, 1807, entered into a contract, with the commissioners duly appointed for the purpose of selling the land tax arising within the county of Monmouth, for the redemption of the land tax charged on the moiety of the farm and lands called Gethley Deague, or Getley Deague, and the Parks in the said county, (the land tax as to the other moiety having been previously redeemed), and in the said contract the consideration for the redemption of the said land tax was declared to be 47*l.* 7*s.* 2*½d.* capital stock in the 'Three per cent. Bank Annuities (the money price of the said capital stock then being 20*l.* 8*s.* 7*d.*), and the said *Edw. Blewitt* shortly afterwards

But *Held* that such payment was a "mistake or inadvertence" within 54 Geo. 3, c. 173, s. 12, and that the sale was made good by that act and 57 Geo. 3, c. 100, s. 25.

purchased and duly transferred the said sum of stock to the account of the commissioners for the reduction of the national debt. This purchase was to relieve the two farms from the land tax, and enable the said *Edw. Blewitt* to sell them under the Land Tax Redemption Acts, to redeem the tax on the other parts of the estate.

10th January, 1807. An auction was held before two of the commissioners for the redemption of land tax, when Gethley or Getley Deague and the Parks were offered for sale by the said *Edw. Blewitt* in four lots, and Mr. *Henry Phillips* became the highest bidder for lots 1, 3 and 4 (which lots are the premises sought to be recovered in this action) at 1430*l.* The premises were bought in at the said sum of 1430*l.*, but were subsequently sold to the said Mr. *Hen. Phillips* by private contract for the same sum, with the sanction of the said commissioners and according to certain written conditions produced at the auction, of which the sixth condition was as follows:—"6. The purchaser of each lot to take the timber trees and saplings down to 2*s.* per stick, and that inclusive: such valuation to be made by two proper persons; one to be appointed by the seller, and the other by the purchaser, or an umpire to be appointed by such two persons on or before the 25th of March next; and the amount to be paid, on completing the contract, over and above the price each lot shall sell for." At the time of such sale, and of the bargain and sale hereinafter stated, there were standing on the said lots 1, 3 and 4, 209 oak trees, 71 beech trees and 6 ash trees; and in pursuance of the said sixth condition of sale, the said timber was valued at 273*l.* 2*s.* 6*d.* Subsequently the 273*l.* 2*s.* 6*d.* were paid by the said *Hen. Phillips* to the said *Edw. Blewitt*, who gave the following receipt for the same:—"Received, the 8th April, 1807, of *Hen. Phillips*, the sum of 273*l.* 2*s.* 6*d.* for all the timber trees standing and growing on Gethley Deague farm and woods, and the Parks and woods thereto adjoining, situate in the parish of Trevethin, county of Monmouth, which said farm, lands and premises said

1841.

DOE  
d.  
BLEWITT  
v.  
PHILLIPS.

1841.  
  
 DOE  
*d.*  
 BLEWITT  
*v.*  
 PHILLIPS.

*Hen. Phillips* purchased of me for the sum of 1430*l.* exclusive of the above said timber, which was valued by *Thos. Richards* and *Wm. Edmunds*, agreeable to the conditions of sale of said premises. *Edw. Blewitt. 273*l.* 2*s.* 6*d.**" It does not appear that this sum of 273*l.* 2*s.* 6*d.* was appropriated to the redemption of land tax.

On the 1st August, 1808, the said *Edw. Blewitt* contracted and agreed with two of the commissioners, so specially appointed as aforesaid, for the redemption of the residue of the land tax charged on the said other estates of the said *Edw. Blewitt* in the county of Monmouth, the consideration for the redemption of which said last mentioned land tax was 2032*l.* 14*s.* 2*d.* capital stock in the Three per cent. Bank Annuities, the money price of which said capital stock was then 1344*l.* 2*s.* 8*d.*

On the 26th August, 1808, a bargain and sale of this date, duly inrolled in Chancery in 1811, was executed under the authority and with the consent and approbation of the commissioners, parties thereto.

[A copy of the deed accompanied the case: no mention was made in it either of the timber or the sum received by the tenant for life on account of it.]

The said sum of 1344*l.* 2*s.* 8*d.* was invested in the purchase of the sum of 2032*l.* 14*s.* 2*d.*, Three per cent. Bank Annuities, which was duly transferred to the commissioners for the reduction of the national debt, and a receipt for the said amount of stock was indorsed on the contract for the redemption of the said land tax by one of the cashiers of the Bank of England. The sum of 20*l.* 8*s.* 7*d.* was paid by the said *Hen. Phillips* to the said *Edw. Blewitt*, to reimburse the like sum expended by the said *Edw. Blewitt* as above stated; and in addition to the said two sums of 20*l.* 8*s.* 7*d.* and 1344*l.* 2*s.* 8*d.* the said *Hen. Phillips*, under the order and direction of the said commissioners, and with the privity and consent of the said *Edw. Blewitt*, paid the residue of the said 1430*l.* to Mr. *Alex. Jones*, solicitor and clerk to the said commissioners, for and on account of the

law expenses incurred in and about redeeming the said land tax.

*Edw. Blewitt*, the tenant for life, died 8th March, 1832. The said *Hen. Phillips* took possession of the said premises in 1807, and continued therein until his death, whereupon the defendant entered upon and continued in quiet enjoyment until this action was brought.

Since the date of the bargain and sale, and up to the present time, the said *Edw. Blewitt* during his lifetime, and the lessor of the plaintiff since the decease of the said *Edw. Blewitt*, have enjoyed the residue of their said estates in Monmouthshire free of land tax, by virtue of such sale as aforesaid.

The question for the opinion of the Court was, whether the bargain and sale of the 26th August, 1808, was invalid by reason of the non-appropriation of the said sum of 273*l.* 2*s.* 6*d.* according to the Land Tax Acts (*a*). If so, the verdict was to stand; if valid, a verdict was to be entered for the defendant.

The case was argued in Easter term, 1840 (*b*), by

Sir *W. W. Follett*, for the lessor of the plaintiff. Major *Blewitt*, being tenant for life only, could not sell the estates to the prejudice of the remainder-man in tail, except under the Land Tax Redemption Acts. The 51st section of 42 *Geo.* 3, c. 116 (*c*), authorises the sale by a tenant for life for

(*a*) 42 *Geo.* 3, c. 116; 54 *Geo.* 3, c. 173; 57 *Geo.* 3, c. 100. The material sections of the two last acts are set out in the judgment.

(*b*) April 28th, before Lord *Denman* C.J., *Littledale*, *Patteson* and *Coleridge* Js.

(*c*) By sect. 51, all persons seised or possessed, or entitled beneficially in possession to the rents and profits of, but who should not have the absolute estate or interest in any manors, &c. were empow-

ered, but nevertheless under the restrictions and regulations thereafter mentioned, absolutely to sell and dispose of, by public sale or private contract, and, by deed indented and inrolled or registered in the manner prescribed by the act, to convey any such manors, &c. as should be eligible and necessary; provided that no sale of any manors, &c. should be made other than for the purpose of redeeming land tax charged thereon,

1841.

DOE  
d.  
BLEWITT  
v.  
PHILLIPS.



1841.

DOE  
d.  
BLEWITT  
v.  
PHILLIPS.

the purposes of the act; and Major *Blewitt*, being tenant without impeachment for waste, might sell the standing timber together with the land; but then the value of such timber was clearly part of the value of the estate; and the tenant for life had no power to apply the money received for it to his own purposes; but it ought to have been paid into the Bank of England under the 98th section (a). Then, by sect. 119, it is required that every deed whereby any sale shall be made, where the consideration shall exceed 200*l.*, shall be inrolled within six calendar months after the execution thereof in one of the courts of record at Westminster, and *after payment of the purchase-money* into the Bank of England in the manner thereinbefore directed, and after such inrolment, every such deed of sale, made by virtue of the act, is declared to be good, valid and effectual in law, to all intents and purposes whatsoever. The effect of this is, that, if the purchase money—that is, the whole of it—is not paid into the bank, the deed of sale is not rendered valid; and therefore there was no valid conveyance in this case. Major *Blewitt*, although unimpeachable for waste, had no power to sell the standing timber separately from the land; *Cholmeley v. Paxton* (b), *Wolf v. Hill* (c), *Doran v. Wiltshire* (d): these were analogous cases under powers. In *Hicks v. Morant* (e) the sale was under the 38 Geo. 3,

and also on other manors, &c. which stood limited or settled and subject to or for the same uses, trusts, intents or purposes, or in the same order or course of limitations as the manors, &c. which should be so sold.

(a) The 98th section directs that all monies to arise by virtue of any sale to be made in pursuance of the act (except such part thereof as shall have been reserved by the order of the commissioners for the payment of expenses), shall be paid by the purchaser into the Bank of England, to the account

of the commissioners for the reduction of the national debt, and be invested in the three per cents., and the receipt of the cashiers of the bank, or any one of them, is declared to be a full and sufficient discharge to the purchaser.

(b) 3 Bing. 207; 11 Moo. 17; S. C. as *Cockerell v. Cholmeley*, affirmed in B. R. 10 B. & C. 564; S. C. affirmed in D. P. 1 Clark & Fin. 60; 6 Bligh, N. S. 120.

(c) 2 Swanst. 149, n.

(d) 3 Swanst. 699.

(e) 3 Y. & J. 286; S. C. affirmed in D. P. 5 Bligh, N. S. 643.

60, where the words are the same as in the act in question: that case is an express authority that, if the parties entitled to sell do not comply with the requisitions of the act, the sale is void.

Then, if the sale was void under the 42 *Geo.* 3, c. 116, it was not been rendered good by the acts, that have been subsequently passed to make sales valid in certain cases, such as the 54 *Geo.* 3, c. 173, s. 12 (*a*), and the 57 *Geo.* 3, c. 100, s. 25 (*a*). Neither of these acts applies to defects of sale where the provisions of the former act have been wholly neglected, (especially in so important a matter as in this case,) otherwise they would have been relied upon in *Hicks v. Morant* (*b*).

Sir *J. Campbell* A. G. for the defendant. The question in this case is, whether the legal estate is in the lessor of the plaintiff. It is submitted that the conveyance of the estate was perfectly valid under the 43 *Geo.* 3, c. 116; but, if there were any doubt as to the point, it would be removed by the 44 *Geo.* 3, c. 173 and 57 *Geo.* 3, c. 100.

There can be no question but that the tenant for life had authority under the act to bar the entail; and all the requisitions of the act in the execution of such authority have been strictly pursued. The contract with the commissioners was regular; the purchase money of the land (1450*l.*) was paid into the bank; the land tax had been redeemed, and the lessor of the plaintiff is now in the enjoyment of the estate so redeemed. The 51st sect. of 42 *Geo.* 3, s. 116 (*c*), confers very different powers from the power in *Cholmeley v. Paxton* (*d*). The act gives a general power of sale to a person having a particular estate, for the purpose of redeeming the land tax. It is not disputed that the timber is to be considered as part of the estate; but the case is the same as if the tenant had sold a few more acres

1841.



DOE

d.

BLEWITT

v.

PHILLIPS.


(*a*) *Vide post*, in the judgment.

(*b*) 3 Y. & J. 286; 5 Bligh, N.S. 543.

(*c*) *Ante*, p. 565.

(*d*) 3 Bing. 207; 11 Moo. 17;

10 B. & C. 564; 1 Clark & Fin. 70; 6 Bligh, N. S. 120.

1841.  
  
 DOE  
*d.*  
 BLEWITT  
*v.*  
 PHILLIPS.

than was necessary. The 98th sect. (a) does not say that, if any part of the money is not paid into the bank, the whole sale is to be invalid. The other side must contend that, if one single shilling was omitted to be paid in, the sale would be void; for the magnitude of the sum can make no difference. The 100th section directs that where there shall be a surplus of stock arising from any sale where the precise quantity of estate necessary to be sold cannot be set apart to be sold, or by reason of the whole of any farm, &c. being sold, such surplus stock shall be sold, and the money arising therefrom applied, under the direction of the Court of Chancery, in the discharge of any debt affecting the lands, the land tax whereon shall have been redeemed, or be laid out in the purchase of other lands, to be conveyed to the same uses as the premises sold stood limited at the time of the conveyance; and where the surplus stock does not exceed 200*l.*, the 102d sect. authorises the payment to a trustee, for the purposes aforesaid, without obtaining the approbation of the Court of Chancery. Would it be contended for the plaintiff that, if the surplus were not applied as thus directed, the conveyance would be wholly void? It may be that, if the deed were not inrolled under the 119th section, the conveyance might be void; but no such inference is to be drawn from the omission to pay in a small portion of the purchase money. But, at any rate, the conveyance, if defective under the former statute, is rendered valid by the 54 *Geo.* 3, c. 172, s. 12 (b), and the 57 *Geo.* 3, c. 100, s. 25 (b).

The doctrine in *Wolf v. Hill* (c) and *Doran v. Wiltshire* (d) is not disputed; for it is not contended that a tenant in tail has any separate property in the growing timber. In *Hicks v. Morant* (e) there had been a total misapplication of the purchase money, and the transaction was never

(a) *Ante*, p. 566.

(d) 3 *Swanst.* 699.

(b) Set out in judgment, *post*, 571.

(e) 3 *Y. & J.* 286; 5 *Bligh*, N. S. 643.

(c) 2 *Swanst.* 149, n.

ied into effect: the purchaser was therefore not in a position to avail himself of the provisions in the two remeasements: besides, that case turned entirely on the equitable rights of the parties.

The 76th sect. of 42 Geo. 3, c. 116, provides that no sale by any bodies politic shall be valid, unless assented to by two commissioners, (and this shews that when the legislature intended to avoid a sale, they did so in express terms,) in *Warner v. Potchett* (a), such assent not having been obtained, a sale by a prebendary was held bad; but where the consent of the commissioners had been obtained, as in the present case, the provisions of the 57 Geo. 3, c. 100, will apply.

Mr W. W. Follett in reply. The party having a life estate was only authorised to sell under particular conditions; and they have not been complied with in this case; for the tenant for life has sold the estate distinct from the timber, although it is admitted by the other side was part of the estate; and has therefore sold part of the estate for his own purposes, which this will vitiate the whole sale. It is argued that the 76th section of 42 Geo. 3, c. 116, does not in terms say that the conveyance shall be void if the money is not paid to the bank, but it does so in effect. It says that the deed shall be enrolled, and it then goes on to say that, *after* such enrolment and *after* the payment in of the money, the conveyance shall be valid; the other side construe this to mean that the conveyance shall be valid although the money is not paid in; though it seems to be admitted that, in a case of non-enrolment, the conveyance would be void; but the same terms are used in both cases, and no distinction is pointed out in the act. *Hicks v. Morant* (b) is directly against this position; and the legal rights of the parties are considered in that case as well as their equities.

The argument that the defect is cured by the later statutes, would apply to every other defect in the execution of

1841.

~~~~~

DOE

d.

BLEWITT

v.

PHILLIPS.

(a) 3 B. &amp; Ad. 921.

(b) 3 Y. &amp; J. 286; 5 Bligh, N. S. 643.

1841.  
 ~~~~~  
 DOE  
*d.*  
 BLEWITT  
*v.*  
 PHILLIPS.

the powers given by the 42 *Geo. 3*; but those statutes were not intended to set up a conveyance in a case where there has been no compliance with the former act in a material point; the later statutes only apply to defects arising aliunde. *Warner v. Potchett* (a) is an important decision in favour of the lessor of the plaintiff.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—The lands in question in this case appear to have been sold in the year 1807 by *Edward Blewitt*, who was tenant for life, with the sanction of the commissioners for redemption of the land tax, under stat. 42 *Geo. 3*, c. 116. They were sold for 1430*l.*, exclusive of the timber, which was sold for 273*l.* 2*s.* 6*d.* The sale was in every respect, except the appropriation of the 273*l.* 2*s.* 6*d.*, in strict conformity to the act of parliament. The 1430*l.* was applied to the redemption of the land tax, in respect of other property comprised in the same settlement as the lands in question, under which *Edward Blewitt* was tenant for life, and the present lessor of the plaintiff was tenant in tail in remainder. The 273*l.* 2*s.* 6*d.* was paid at once to the tenant for life. A conveyance was executed to the purchaser, under whom the defendant claims, in the usual form, the consideration of which is stated to be 1430*l.* The conveyance does not expressly mention “timber” in the description of the parcels conveyed. Neither does it except “timber.” It would therefore pass as part of the land.

It is evident that all parties acted under a mistaken notion that the timber belonged to the tenant for life, who was tenant without impeachment of waste; and therefore the 273*l.* 2*s.* 6*d.* was under such mistake wrongly paid to him. If such mistake had not been made, one of two things would have happened. Either a smaller quantity of land would have been sold, so as to make the price of the land *with* the timber 1430*l.* only, or the 273*l.* 2*s.* 6*d.* would have been

(a) 3 B. & Ad. 921.

paid into the Bank of England, under the 100th section of stat. 42 *Geo.* 3, c. 116, which directs the application of any surplus. The remainderman would in neither case have sustained any injury. As it is, the public purposes of the act 42 *Geo.* 3, c. 116, have all been strictly fulfilled: but the remainderman has sustained an injury in the loss of the 273*l.* 2*s.* 6*d.*

The question is, whether, under these circumstances, the conveyance in 1807 is good under stat. 42 *Geo.* 3, c. 116; and, if not, whether it is made good by either of the subsequent statutes, 54 *Geo.* 3, c. 173, s. 12, and 57 *Geo.* 3, c. 100, s. 25.

Two cases were cited to shew that the conveyance was void: *Cholmeley v. Paxton* (a), same case in error (b), same case in House of Lords (c); also *Hicks v. Morant* (d), same case in House of Lords (e). Neither of these cases apply. The first turns on the construction of a power; the second was a bill for a specific performance, and turned purely on a question of equity. But as the 119th section of 42 *Geo.* 3, c. 116, makes the conveyance valid, upon payment of the purchase money into the Bank of England and upon enrolment, it may well be contended that, by reason of the *whole* purchase money not having been so paid, the conveyance is not valid.

Assuming this to be the case, is the fault cured by stat. 54 *Geo.* 3, c. 173, s. 12?

That section is as follows: "And whereas, for the purpose of redeeming land tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land tax charged on lands and other hereditaments belonging to persons for the time being seised or possessed, or entitled beneficially in possession to the rents and profits of, but not having the abso-

1841.  
  
 DOE  
*d.*  
 BLEWITT  
*v.*  
 PHILLIPS.

(a) 3 Bing. 207; S.C. 11 Moo. 17. Clarke & Fin. 60; S.C. 6 Bligh,

(b) *Cockerell v. Cholmeley*, 10 N. S. 120.

3. & C. 564.

(d) 3 Y. & J. 286.

(c) *Cockerell v. Cholmeley*, 1

(e) 5 Bligh, N. S. 643.

1841.

  
 DOB  
 d.  
 BLEWITT  
 v.  
 PHILLIPS.

lute estate or interest in such lands or other hereditaments, or for some other purposes for which lands and hereditaments are authorised to be sold by such persons, under the powers and provisions of the said act of the forty-second year of his present Majesty, or of some subsequent act relating to the redemption and sale of the land tax, some sales of lands and other hereditaments may have been or may be made by persons so seised or entitled, not strictly authorised to sell by such powers and provisions, without some further assurance in the law; or by reason that all the lands and other hereditaments of or to which the persons making such sales were respectively so seised or entitled, did not at the times of such sales stand limited and settled, and subject to or for the same uses, trusts, intents and purposes; or by reason that a greater quantity of an estate has been sold than may have been necessary to be sold for the authorised purposes; or by reason of some other mistake and inadvertence; now be it further enacted, that all sales so made as aforesaid, and all conveyances executed of the lands or other hereditaments so sold, provided the same have been respectively made and executed bonâ fide and for valuable consideration, and shall appear to have been made and executed under the authority and with the consent and approbation of the commissioners, as required by the said acts or any of them, in cases of sales under the powers of the said acts, shall be and the same are hereby ratified and confirmed, from the respective periods at which such sales and conveyances were respectively made and executed, and shall be from such respective periods as valid and effectual in the law, as if such sales and conveyances had been made and executed in strict conformity to the powers and provisions under which the same were intended to have effect; any thing in the said act of the forty-second year of his present Majesty, or of any such subsequent act as aforesaid, to the contrary notwithstanding."

Then section 13 gives the party injured relief in equity.

The preamble of section 12 speaks of more having been

sold than was necessary, “or by reason of some other mistake or inadvertence.” We have no doubt, upon considering these statutes and the facts of this case, that the payment of the 27*l.* 2*s.* 6*d.*, the price of the timber, to the tenant for life, was a “mistake or inadvertence” within the meaning of the twelfth section of stat. 54 *Geo.* 3, c. 173, and that the conveyance in question, if invalid under stat. 42 *Geo.* 3, c. 116, is made valid by that section.

Again, stat. 57 *Geo.* 3, c. 100, s. 25, is in these words:—  
 “And whereas, for the purpose of redeeming or purchasing land tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land tax, or for purchasing assignments of land tax, or for some other purposes for which lands and hereditaments were authorised to be sold under the powers and provisions of the acts heretofore passed, relating to the redemption and sale of the land tax or some of them, some sales of lands and other hereditaments have been made, the titles to which, as derived under such sales, may be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof; now be it further enacted, that all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land tax, or for raising money as hereinbefore is mentioned, provided such conveyances shall appear to have been executed under the authority and with the consent and approbation of the respective commissioners for the time being, authorised to consent to sales made under the powers of the said acts respectively, or any of them, shall be and the same are hereby ratified and confirmed, from the respective periods at which such sales and conveyances were respectively made and executed, and the same shall be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through,

1841.

DOE  
 d.  
 BLEWITT  
 v.  
 PHILLIPS.



1841.

DOE  
d.  
BLEWITT  
v.  
PHILLIPS.

under or in trust for them respectively, a good and valid title, both at law and in equity, to such lands or hereditaments, to all intents and purposes whatsoever; any thing in the said acts, or any law or custom, to the contrary notwithstanding."

It was argued that this last section applies to defects in the title of the person conveying; but, on attending to the language of it, it plainly applies to defects in the title of the purchaser by reason of some non-compliance with the former act, and would undoubtedly make valid the conveyance in question, even if stat. 54 Geo. 3, c. 173, s. 12, did not.

The rule must be absolute to enter a verdict for the defendant.

A.

Rule absolute.

Tuesday,  
January 12.

ROGERS v. CUSTANCE.

Common  
count in debt  
for work and  
labour.

Particulars  
of demand for  
contract work  
and extra  
work.

Plea, that  
the work, in  
the count men-  
tioned, was  
done under a  
contract, that  
before com-  
mencement of  
suit there was  
a dispute  
between the

DEBT for 73*l.*, for work, labour and materials, and on an account stated.

Pleas: 1. Except as to 23*l.*, parcel &c. (paid into Court), *nunquam indebitatus*. Issue thereon.


2. Except as before; that the work and labour in the first count mentioned was provided in pursuance of a contract, whereby the plaintiff had agreed to lay a permanent way for the defendant at a certain price per yard, that the plaintiff claimed to have performed his contract on which a controversy had arisen, and that the defendant contended the work was not properly done; that a second agreement was then entered into, by which the plaintiff was to accept

parties as to whether the plaintiff had properly performed the contract, whereupon, to end the dispute, it was agreed that the defendant should accept the work at a price below the original contract price; that by virtue of the last mentioned agreement defendant became indebted to the plaintiff in the sum in the count mentioned; and that afterwards, in pursuance of the last mentioned agreement, defendant paid the plaintiff, and plaintiff accepted, the sum in the count mentioned in full satisfaction, &c.

Replication traversing the payment and acceptance &c.

Held that, as the plaintiff had not new assigned, he could not recover for the extra work.

a lower price in full satisfaction, and so the defendant became indebted in the sum mentioned in the first count, except as aforesaid. The plea then averred payment and acceptance of that sum in pursuance of the said agreement.

1841.  
  
 ROGERS  
 v.  
 CUSTANCE.

The replication traversed the payment and acceptance of the money in the second plea mentioned in discharge of the money in the first count mentioned. Issue thereon.

3. As to the 23*l.*, payment into Court, which plaintiff accepted.

The particulars of demand were as follows :

1838.	£.	s.	d.
<b>Extra work.</b>			
For shifting and lowering part of the permanent railway at Brockley Hill, 130 days, at 3 <i>s.</i> 6 <i>d.</i>			
per day . . . . .	22	15	0
For shifting and lowering part of the permanent way at Brockley Hill, 111 days, at 3 <i>s.</i> 6 <i>d.</i> per day . . . . .	19	8	6
To 14 days' labour, at 3 <i>s.</i> 6 <i>d.</i> per day, for adzing of timbers, &c. . . . .	2	9	0
<b>Contract work.</b>			
For laying of permanent way at Brockley Hill, 858 yards, at 5 <i>s.</i> per yard. . . . .	214	10	0
To 115 yards of ballasting, at 2 <i>s.</i> 6 <i>d.</i> per yard . . . . .	14	7	6
To 43 cross drains, at 1 <i>s.</i> 3 <i>d.</i> per drain . . . . .	2	13	9
	276	3	9
By cash on account	203	18	10
Balance	72	14	11

At the trial before Lord Denman C. J. at Guildhall, the defendant proved payment of everything due under the second agreement; but the plaintiff contended that the action was brought to recover for the extra work; and, that demand having been proved to the amount of 49*l.* without any answer, a verdict was taken for the plaintiff for that sum, with leave reserved to the defendant to move to enter the verdict for himself.

1841.

ROGERS  
v.  
CUSTANCE.

A rule nisi having been obtained for that purpose,

*E. James* shewed cause in last Michaelmas Term (a). The only question is whether the claim in the declaration is answered by the second plea; that plea is nothing in fact but a plea of payment, notwithstanding the long inducement. The plaintiff only seeks to recover a balance of 72*l.*, and the defendant is bound to shew that the payment was applicable to that sum. It was contended at the trial, on the part of the defendant, that, as the replication had not traversed the facts in the inducement, it admitted the contract: but the substantial part of the plea was in fact traversed, which was all that was necessary; and immaterial allegations are not thereby admitted; *Bennion v. Davison* (b). It was also argued that this was a case in which the plaintiff should have new assigned; but *James v. Lingham* (c), and *Freeman v. Crafts* (d), are precisely in point to shew that no new assignment is necessary in such a case.

Sir *F. Pollock* and *G. S. Wilson* contrà. It may be admitted that where the declaration is general, and the plea of payment is also general, the defendant must by his evidence make the plea apply to what the plaintiff declares for; but here, though the declaration is general, the plea is special: the inducement to it being so framed as to guard against the argument that might be drawn from *James v. Lingham* (c) and *Freeman v. Crafts* (d): if the plaintiff meant to set up a different claim from that answered by the plea, he ought to have new assigned. As the record stands there is a clear admission that the payment pleaded relates to the monies claimed by the declaration.

*Cur. adv. vult.*

(a) 19 Nov. before Lord Denman C. J., *Littledale, Williams and Coleridge* Js.

(b) 3 M. & W. 179.

(c) 5 Bing. N. C. 553; S. C. 7 Scott, 603.

(d) 4 M. & W. 4.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an application to enter a verdict for the defendant. The declaration was for work and labour. The second plea, upon which the point turns, was pleaded to *the whole demand in the first count*, (except as to 23*l.*, on which nothing turns), and stated that the work and labour there mentioned, except &c., were provided in pursuance of an express contract, whereby plaintiff had agreed to lay a permanent way for defendant at a certain price per yard; that plaintiff claimed to have performed his contract, on which a controversy had arisen, the defendant contending that the work was not properly done; that a second agreement was then entered into, by which plaintiff was to accept a lower price in full satisfaction: and so defendant became indebted in the sum mentioned in the first count, except as aforesaid; concluding with averments of payment and acceptance of that sum in pursuance of the said agreement.

The replication traversed the payment and acceptance of the money in the second plea mentioned, in discharge of the said money in the said first count mentioned. The particulars of demand stated the action to be brought to recover a certain sum for the laying a permanent way, and another sum for extra work. Upon the trial defendant proved payment of every thing due under the second agreement, and acceptance of that sum on that account; but the plaintiff contended that the action was brought to recover for the extra work, and, that demand having been proved to the amount of 49*l.* without any answer, a verdict was taken, with leave to move to enter it for the defendant.

And we are of opinion that the rule granted for that purpose should be made absolute. Where the declaration and plea are both general, and the plaintiff by his particulars points his demand to a particular balance of accounts between the parties, there the defendant will not be entitled to the verdict merely because he proves payment of a sum equal to the demand proved; for in the first place the issue is on the payment having been made and received in satis-

1841.

ROGERS  
v.  
CUSTANCE.

1841.

ROGERS  
v.  
CUSTANCE.

faction of *the demand in the declaration*, and secondly, there is no reason in justice why to such a plea the plaintiff should be called on to new assign under the circumstances stated, because in fact both parties are fully apprised of that which they came to try, and the defendant's proof is indeed a mere trick upon the plaintiff. This was the case of *James v. Lingham* (a), which was cited for the plaintiff, and with which we entirely agree.

But this present case is essentially distinguishable. The declaration is general, but the plea narrows it, states the demand to be for the work done under the contract, and shews that that has been satisfied. If, as the plaintiff now contends, the plea was wrong in so pointing the declaration, and the action was really brought for the extra work, this was exactly the case in which the plaintiff should have new assigned: for the ambiguity did not arise merely on the proof at the trial, but the plea on the face of it shewed that it had not hit the declaration. By taking issue on the payment and acceptance, limited as the plea had limited it, in respect of the account on which paid and received, the plaintiff accepted the narrowed issue, and would have misled the defendant if he could be at liberty at the trial to go for the extra work.

Reliance was placed on the particulars of demand, but they specified both heads of demand as insisted on in the action, and therefore leave the argument untouched. But, even if they had been confined to the extra work, yet, as they would then have been inconsistent with the plea, they could not have prevailed to make that the issue between the parties, which the plea and replication unequivocally shewed not to be the issue.

We are of opinion therefore that this rule must be absolute to enter the verdict for the defendant.

A.

Rule absolute.

(a) 5 Bing. N. C. 553; S. C. 7 Scott, 603.

1841.

DOE, *d.* JAMES HAMILTON, D. D., and MARY ANN, his  
Wife, *v.* DANIEL CLIFT.

**EJECTMENT** to recover an undivided moiety of a customary messuage and tenement in the manor of Lupton, in the parish of Kirkby Lonsdale, Westmoreland. On the trial before *Tindal C. J.*, at the Appleby summer assizes, 1835, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

*James Clarke Satterthwaite*, on the 7th December, 1801, was admitted to a customary messuage and tenement called Lupton High, in the manor of Lupton, and on the 1st of May, 1825, died seised thereof intestate as to his real estate, and leaving issue *James Satterthwaite*, D. D. his son, and *Mary Ann* (one of the lessors of the plaintiff) his second daughter, who married *Dr. James Hamilton* (the other lessor of the plaintiff), and also three grandchildren, who were the children of his eldest daughter *Hannah* (who having survived her husband *John Head*, died on the 9th Sept. 1821, in her father's lifetime), namely, *Jane Head* (who married the Rev. *George Coventry*), *James Pearson Head* and *Mary Ann Head* him surviving.

On the death of *James Clarke Satterthwaite*, *James Satterthwaite*, his son, took possession of the said customary messuage and tenement, and received the rents and profits thereof during his lifetime, as well as of two other customary messuages and tenements within the said manor, called Gillbank and Cow Brow Head, and also of certain customary closes within the said manor, which last-mentioned two messuages, tenements and closes *James Satterthwaite* had purchased, and of which he had been admitted tenant during his father's lifetime. *James Sat-*

1. Where the custom of a manor is that the customary tenements are held to the tenants *and their heirs*, and that, when a tenant dies seised, leaving sisters only, the eldest sister should take in exclusion of the other sisters, and that the heir of an eldest sister, who should die in the lifetime of such tenant, should take in exclusion of the younger sisters surviving the tenant, there, if the heir of a tenant, who has been admitted and has died seised, take possession, but die without having been admitted, he nevertheless dies *seised*, so as to let in the custom.

But such heir, although he has taken possession, does not die

*seised*, unless he has been admitted, where the customary tenement is held, not to the tenant and his heirs, but during the joint lives of the tenant and the lord, with a tenant-right of renewal, binding the lord to admit the customary heir of a tenant. It makes no difference, in this respect, that, by the custom, the customary tenements are devisable.

1841.

DOE  
d.  
HAMILTON  
v.  
CLIFT.

*terthwaite* died in November, 1827, intestate as to his real estates, never having been admitted tenant of the said customary messuage and tenement called Lupton High, and leaving his nephew the said *James Pearson Head* and his sister *Mary Ann Hamilton* co-heirs of his freehold estates. At a court holden for the manor of Lupton on the 27th June, 1828, being six months after his death, the name of *James Satterthwaite* was entered on the court rolls as tenant, as being the only son and heir-at-law of the late *James Clarke Satterthwaite* deceased, of the Lupton High, to hold the same during the joint lives of the lord and tenant. And at the same court appeared *James Pearson Head*, the son and heir-at-law of *Hannah Head*, the eldest sister of the said *James Satterthwaite*, and was admitted tenant, as being the nephew and customary heir of the said *James Satterthwaite* deceased, of the messuage and tenement called Lupton High and also of those called Gillbank and Cow Brow Head, and continued in possession thereof until the time of his death in 1829, when he devised the same by his will (the customary tenements of the said manor being devisable according to the custom of the manor) to his sisters, *Jane*, wife of Rev. *George Coventry*, and *Mary Ann*, afterwards wife of Mr. *Rudd*. They were admitted tenants thereof at a court holden for the manor in 1832, and afterwards surrendered the said premises to the defendant *Clift*, who was admitted, and now is tenant thereof.

The defendant insisted upon a custom of the manor in favour of the descent to the eldest sister of the person last seised, in exclusion of the other sisters, and to the heir of an eldest sister deceased in the lifetime of the person last seised, in exclusion of surviving younger sisters.

The steward of the manor of Lupton was called by the defendant and produced the court book of the manor, in which appeared in 1741 an admittance of *Hugh Ashton*, and in 1749 an admittance of one *James Ashton*, son and heir of his father *Hugh Ashton*, to two cattlegates, half the fine paid, the other half to be paid on the death of his

father's widow *Eleanor*; also an admittance in 1768 of *Elizabeth*, wife of *Joseph Burrow*, upon the death of her brother the said *James Ashton*, to be tenant of one of such cattlegates. He also produced a book, in which were entered the verdicts or presentments of the juries of the manor, the original verdict papers being also produced; in which appeared a presentment of the same date 1768, in which the jury found that *Elizabeth Burrow* ought to be admitted tenant to one cattlegate by descent from her late brother. It further appeared that she had younger sisters then living. It also appeared from the court roll that in 1785 *Joseph Burrow*, son of *Elizabeth*, was admitted tenant on the decease of his grandfather *Hugh Ashton* to half two grasses; it appeared from the book wherein the presentments of the juries were copied, that at the same time the jury presented that the grandfather's widow *Eleanor* died since the last court, and that by her death *Joseph Burrow* ought to be admitted tenant of half two grasses as grandson and heir of *Hugh Ashton* deceased, the said *Eleanor* having held the same as his widow since his decease. The grasses of which *Joseph Burrow* was admitted tenant to a moiety in 1785 are the same grasses to which his uncle *James Ashton* was admitted in 1749, as heir of his father *Hugh Ashton*, by the description of two cattlegates, half the fine being then respited until the decease of the father's widow, on whose death *Joseph Burrow* was admitted and paid the fine.

It further appeared that *Elizabeth Burrow* had three younger sisters, born in 1736, 1737, and 1740 respectively, who were all alive in 1785 and for several years after. It was also proved by the steward that the court rolls went back as far as 1642, and that there was no instance of a customary estate descending to or any admittance of coparceners.

The steward also as well as two aged witnesses further proved, that the reputation of the custom in the manor was, that in case of a person dying seised leaving only daughters,

1841.



DOR


d.

HAMILTON

v.

CLIFT.



1841.  
  
 DOE  
*d.*  
 HAMILTON  
*v.*  
 CLIFT.

the eldest daughter takes; leaving only sisters, the eldest sister takes; and that, if the eldest daughter die leaving issue in the lifetime of the person last seised, her heir takes, in exclusion of the other daughters; and, if the eldest sister die, leaving issue, in the lifetime of the person last seised, her heir takes in exclusion of the other sisters.

The lessors of the plaintiff objected to the admissibility of the original verdict papers, and also of so much of the evidence of reputation as extended the custom to the case of the heir of a deceased eldest daughter, or of a deceased eldest sister, of a person dying seised, taking in exclusion of the surviving younger daughters or sisters.

The questions for the opinion of the Court were, first, whether the evidence objected to was admissible. Secondly, whether, if it was admissible, the lessors of the plaintiff under the above circumstances were entitled to recover. Thirdly, whether if it, or any part, was not admissible, the lessors under the above circumstances were entitled to recover.

*Cresswell* for the plaintiff (*a*), to shew that the alleged custom had not been sufficiently proved, cited *Den v. Spray* (*b*), Lord Coke in *Ratcliffe* and *Chaplin's* case (*c*), Sir John Savage's case (*d*).

To shew that the custom, if established, did not operate in this case, because Dr. *Satterthwaite* had not been admitted, and therefore did not die seised, he cited *Co. Comp. Cop. s. 41*, *Bevil's* case (*e*), *Clements v. Scudamore* (*f*).

*Wightman* contra, on the first point, cited *Doe d. Mason v. Mason* (*g*), where it was held that a single admittance to

(*a*) Easter term, 1838 (May 1), before Lord Denman C. J., *Littledale*, *Patteson* and *Coleridge* Js. The case was argued a second time in Easter term, 1840. *Vide post*.

(*b*) 1 T. R. 466.

(*c*) 4 Leon. 242.

(*d*) 2 Leon. 109.

(*e*) 4 Rep. 8 a.

(*f*) 1 P. Wms. 63.

(*g*) 3 Wils. 63.

a copyhold was evidence to prove a custom in a manor for lands to descend to the youngest nephew.

On the second point he cited *Vaughan d. Atkins v. Atkins* (a), *Brown's case* (3d resolution (b)), *Rex v. Rennett* (c).

*Cresswell* replied.

*Cur. adv. vult.*

Lord DENMAN C. J., in Michaelmas vacation, 1839 (Nov. 30), delivered the judgment of the Court.—It appears that the custom for the eldest female to inherit, instead of the estate going to females in coparcenery, only exists in cases where a person dies seised of the estate. The case therefore branches into two questions. First, whether Dr. *Satterthwaite*, the son of *James Clarke Satterthwaite*, died seised of the premises in question; and, if he did, then whether in this case the custom is well established.

In arguing the case the counsel have not dwelt so much upon the latter question as upon the first, viz. whether Dr. *Satterthwaite* died seised of the customary estate in question.

Customary estates in the north of England differ very much from each other in their incidents and qualities in different manors, and all differ from common copyholds, though in many respects they have the same general rules applicable to them; and, as the questions as to copyholds are more numerous in our books than as to customary estates, we will first consider how this question should be decided, if it was a common copyhold of inheritance.

It is clearly settled that the heir of a copyhold may, before admittance, enter upon the land and take the profits; that he may maintain trespass against persons who come upon the land; that he may make a lease warranted by the custom of the manor; that he may surrender the estate, but so that the lord shall not be prejudiced as to his fine;

(a) 5 Bur. 2764.

(b) 4 Rep. 22 b.

(c) 2 T. R. 197.

1841.

DOE  
d.  
HAMILTON  
v.  
CLIFT.

1841.  
  
 DOE  
 d.  
 HAMILTON  
 v.  
 CLIFT.

that he may maintain an ejectment, though formerly this was doubted, unless he brought it within a reasonable time after the death of his ancestor. All these incidents seem almost necessarily to attach, because the lord may not hold a court for a considerable time after the death of the former tenant, and, if the heir could not do these things, he would not have the full enjoyment of the estate. And so also the heir of an admitted heir may enter and take the profits before admittance; and, where he enters and takes actual possession, and dies before admittance, there shall be a *possessio fratris*. For if a copyholder in fee have issue a son and a daughter by one ventre, and a son by another ventre, and die seised, and the son by the first ventre enter into the land and die before admittance, the daughter shall inherit as heir to her brother, and not the son by the second ventre, as heir to his father. All these points will be found in *Brown's case* (a), *Clarke v. Pennifather* (b), *Coke's Complete Copyholder*, sect. 41, 1 *Rol. Abr.* 502, Copyhold (N), *Bullock v. Dibler* (c), *Gilbert's Law of Tenures*, 162, *Anonymous* (d) case in *Dyer*.

There are also some incidents to copyholds as to what attaches before admittance, in cases where it is only by the custom of manor that the estate arises. The wife is not entitled to free bench or dower, nor the husband to be tenant by the curtesy of copyholds, unless there be a special custom in the manor, as appears by *Brown's case* (a) and *Rivet's case* (e).

The case of *Ewer d. Heydon v. Astwike* (f), was an ejectment brought by *Francis Ewer* against *Astwike*, and it was found by special verdict that *Heydon* took a wife upon whom a copyhold descended, which was part of the manor of Flamstede, in which manor was a custom that, if the wife seised of a copyhold has a husband, and they have

(a) 4 Rep. 21 a.

(b) 4 Rep. 23 b.

(c) Pop. 38; S. C. Moore, 596.

(d) 3 Dyer, 292 a, pl. 69.

(e) 4 Rep. 22 b.

(f) 1 Anderson, 192; S. C. nom.

*Ever v. Aston*, Moore, 271.

issue, and the wife dies, the husband shall have the land for life as tenant. *Heydon* entered into the land before any admittance, claiming it in right of his wife, and before admittance the wife died, and the husband made the lease on which the ejectment was brought. One of the points was, whether, the wife having died before admittance, the custom applied. And upon that *Anderson* says, that the better opinion of the Court seemed to be that *Heydon* was entitled by the custom. *Moore* states the argument on this point, but it does not appear that any opinion was expressed by the Court. But, by both reports, the case went upon another point, as to the sufficiency of the declaration, and no judgment was given. It is to be observed, that at the end of the case of *Bullock v. Dibley* (a), in *Moore*, 597, the reporter says, “*Nota Dyer*, fo. 292, *possessio fratris d’un copyhold coment que il morust devant admittance. Sic semble de tenancy per le curtesie.*” It is to be observed that in *Ewer d. Heydon v. Astwike* (b) the expression is *seised* of a copyhold, the same as in the present case. But the question as to the husband being tenant by the curtesy, though his wife was never admitted, is completely settled by the case of *Doe d. Milner v. Brightwen* (c), though all the instances to prove the custom were where the wife had been previously admitted. And the Court said that they thought “the admission of the wife is not a necessary ingredient by the custom to entitle the husband to hold for his life, in cases where the title of the wife is complete without admission by the general law of copyholds, as is the case where her title is as heir, in which case any person may derive title through her by operation of law, without admittance, and the title of the husband is by operation of law.”

*Gilbert*, in his *Law of Tenures*, p. 288, says, that it was reasonable that the widow shall have her widow’s estate, though her husband was not admitted. The case of

1841.  
  
 DOE  
 d.  
 HAMILTON  
 v.  
 CLIFT.

(a) *Moore*, 596; *S. C. Pop.* 38. *Ever v. Aston*, *Moore*, 271.

(b) 1 *Ander.* 192; *S. C. nom.* (c) 10 *East*, 583.

1841.  
  
 DOE  
*d.*  
 HAMILTON  
*v.*  
 CLIFT.

*Vaughan d. Atkins v. Atkins* (a) would perhaps scarcely be sufficient to support the proposition, if it were doubtful. There the surrenderee died before admittance, leaving a widow, and after the death of the surrenderee his heir was admitted, and it was held that his widow was entitled to free bench. The reason given is (b), that "the vendor, his widow, his heir, and all claiming under him, are concluded from saying, after admittance, 'that the land did not pass from the day of the surrender.' Upon this ground the lessor of the plaintiff claims the inheritance whereof his brother died seised: it shall not be in his mouth to say against the widow, 'that his brother did not die seised.'"

We may consider that the heir has a complete title to the copyhold against everybody but the lord. And, therefore, in the case of *Rex v. Rennett* (c), the Court refused a mandamus to admit the heir of a copyhold. But, in *Rex v. The Masters &c. of the Brewers' Company* (d), the Court granted a mandamus to admit an heir, "because, although he has a good title as against every one but the lord, still he has a right to insist upon admittance to make him a complete copyholder. He may wish to be put upon the homage, or to be put in nomination for various offices, or to surrender to the use of his will;" and, in that case, he also wanted to surrender to a mortgagee. And it is said that the heir is not a complete copyholder till admittance; that creates the difficulty, whether he can be said to be seised till that be done. The fine cannot be paid till admittance, and he is also subject to some other disabilities not material to this inquiry. But he cannot "maintain a plaint in the nature of an assize in the lord's court before, because till then he is not complete tenant to the lord, no farther forth than the lord pleaseth to allow him for his tenant. And therefore if there be grandfather, father and son, and the grandfather is admitted and dieth, and the father enter-

(a) 5 Bur. 2764.

(b) 5 Bur. 2787.

(c) 2 T. R. 197.

(d) 3 B. & C. 172; S. C. 4 D. & R. 492.

th and dieth, before admittance, the son shall have a plaint  
 the nature of a writ of ayel, and not an assize of mort-  
 ancestor.”—*Coke’s Complete Copyholder*, sect. 41. As  
 the writ of ayel or mort d’ancestor, *Gilbert* (Law of  
 Tenures, 287) says, he may have assize of mort d’ancestor  
 upon his ancestor’s admittance. We do not think it very  
 material whether he can or not, for at all events he cannot  
 have a plaint in the lord’s court, which is the material thing,  
 or that is founded upon a seisin.

In the case of common socage lands, an heir becomes  
 seised by entering upon a freehold interest to which he has  
 a right of entry, and taking the profits; but he requires no  
 investiture from his superior lord. If he is a free tenant of  
 the manor he may have to pay a relief upon the descent;  
 or that the lord may distrain: but no investiture is necessary  
 to give him a complete seisin. It is otherwise in the case  
 of copyholds; for there an investiture is necessary, which is  
 done by the admittance of the tenant; and the form of the  
 admittance of the heir is, that the lord grants seisin of the  
 copyhold premises by the rod, to have and to hold to the  
 said A. B. his heirs and assigns for ever, at the will of the  
 lord according to the custom of the manor. And it may be  
 said that, as the very form of the admittance is to confer a  
 seisin, a person cannot be seised till that takes place.

It is to be remarked, however, that in the *Anonymous*  
 case in *Dyer* (a) before referred to, as to the possessio fratris,  
 it is said, (and the marginal notes in *Dyer* are attributed to  
 Lord Chief Justice Treby, and are considered as of authority,)  
 that in a case “between *Holmes* and *Facie* it was adjudged  
 that the possession of the termor shall be the possession of  
 the heir, and that it shall be the possession of the brother  
 without admittance, for the seisin given to his ancestors  
 sufficeth for him and all his heirs; but he is not tenant to  
 the lord until admitted, nor is a purchaser seised till admit-  
 tance.” And in *Brown’s* case (b) it is said that the heir “is  
 tenant by copy of court roll, for the copy made to his

(a) 3 Dyer, 291 b.

(b) 4 Rep. 22 b. 3d resolution.

1841.

DOE  
 d.  
 HAMILTON  
 v.  
 CLIFT.

1841.

DOE  
d.  
HAMILTON  
v.  
CLIFT.

ancestor belongs to him." These authorities seem to shew that the heir may be said to be seised before admittance and, as is shewn, he may be for most purposes, as in the instances before adduced.

But it may be said that these authorities as to the interest of the heir, and the incidents before mentioned as to the *possessio fratris*, the tenancy by curtesy, and free bench, only apply to the general law of copyholds and descents, and estates which grow out of others by the ordinary rules of law, but that this is the case of a custom which deviates from the general rules of law, and, to bring a person completely within it, there should be a full and complete tenancy to give an entire seisin to all intents and purposes. As applicable to this we may mention a case which is mentioned by Lord *Holt* in giving the judgment of the Court in *Clements v. Scudamore* (a), which principal case, though it has some analogy, yet does not bear upon this case. A person, seised of a copyhold in fee in the nature of borough English, had five sons, the youngest of whom died in the lifetime of the father, leaving issue a daughter; and then the father died; the youngest son's daughter shall inherit the land. The case we allude to is said, in Lord *Holt's* judgment, to have been adjudged in Lord *Bridgman's* time, and not reported in any printed book; but it appears to be the same that is noticed in the argument in *Newton v. Shaftoe* (b) in the name of *Pain v. Herbert* and in some of the reports called *Fane v. Barr* (c). The case was, that the copyhold lands of every tenant dying seised were, by the custom of the manor, descendible to the youngest son, and a surrender was made to the use of *B.* and his heirs, who died before admittance: it was agreed, if *B.* had been admitted, the youngest son, after his death, should have inherited: *B.* died before admittance: the question was, between the eldest and the youngest son of *B.*, who should have the land; and adjudged in this case the eldest son should have the land, because of the strictness of the custom, and there

(a) 1 P. Wms. 63.

(c) 1 Salk. 243; 1 P. Wms. 65.

(b) 2 Keb. 158.

never having been any seisin in the ancestor. But by the report which Lord *Holt* had, it would have been otherwise, if it had been alleged that the lands were in the nature of borough English, (which it was not, but only set forth as a particular custom,) for the law takes notice of the custom of borough English, but not of that special custom; which is likewise the reason why, in pleading that lands are in the nature of borough English, you need not set forth the nature of that custom specially. That case differs from the one now under consideration, that there it was the surrenderee who died before admittance. In the case we are considering, it is the heir who dies before admittance. Now there is a great difference between the two cases; for the surrenderee, without admittance, is not a tenant of the manor at all, and therefore never can be said to die seised; whereas the heir before admittance is a tenant of the manor, though not a complete tenant; and the remarks and authorities which we have before cited shew that for some purposes he may be said to be seised before admittance.

But what is the conclusion to be drawn from that authority it is not necessary to decide, considering what follows as to the nature of the customary estate in the special case.

But, supposing that the heir of a copyholder in fee may be said to die seised, so far as to let in the customary descent, it is another question whether, in the case on which we are to decide, Dr. *Satterthwaite* died seised. The customary estate, of which his father *James Clarke Satterthwaite* died seised, is not a customary estate of inheritance, to which he was admitted to hold to him and his heirs, but it was to hold to him during the joint lives of the lord and himself. Upon his death, therefore, the estate ceased; and, though by the custom of the manor there was a tenant right of renewal, on which the lord was bound to act, and admit his heir, yet, till he was admitted, he had no estate at all; and it cannot be said that he was in any respect a tenant of the manor. In the *Duke of Somerset v. France* (a) it was all along taken

(a) 1 Str. 654; S. C. Fort. 41.

1841.  
  
 Doe  
 d.  
 HAMILTON  
 v.  
 CLIFT.



1841.  
 ~~~~~  
 Doe  
 d.  
 HAMILTON  
 v.  
 CLIFT.

for granted that, in this description of customary estates, the estate of the tenant ceased at the death of the lord or the tenant, though the heir had a tenant right, which entitle him to be admitted. He might, indeed, enter and take the profits, and perhaps maintain trespass against a person who came upon the lands; but he would not be entitled to do the other things above enumerated, which might be done by the heir of the copyholder in fee, unless there was a custom to authorise them to be done.

It appears by the case that, by the custom of the manor, these estates are devisable by will, but that does not seem to make any difference; that is only the power of substituting another person, whom the lord is to admit, instead of admitting the heir.

And, as we think that, in tenant-right estates of the description which this is, the heir cannot be considered as being a tenant of the manor till admitted, he cannot be said to have died seised, and, therefore, the custom for the eldest female to have the whole estate does not attach, and therefore the plaintiff is entitled to recover the moiety claimed in the ejectment.

After the delivery of this judgment, the case was amended by rule of Court as follows:—After the words in the case (p. 580), “the name of *James Satterthwaite* was entered on the court rolls as tenant, as being the only son, and heir at law of the late *James Clarke Satterthwaite*, deceased, of the Lupton High, to hold the same during the joint lives of the lord and the tenant,” the following words were introduced: “according to the custom of the said manor, as settled by indenture and decree, of which there is an entry on the court rolls of the said manor, by which it appears that the copyhold tenements of the said manor are held by the tenants thereof to them and their heirs, by custom of tenant-right of the lord of the said manor.”

The case was argued a second time in Easter term, 1840 (a).

(a) April 28, before Lord Denman C. J., *Littledale*, *Patteson* and *Coleridge* Js.

*Cresswell* for the plaintiff.

*Wightman* contra, in addition to the authorities which were cited in the former argument, cited *Roe d. Beebee v. Parker* (a), as to the evidence of the custom; and on the other point, as to the necessity of admittance, he cited 1 *Scriven* on Cop. 358 (b), Lord *Mansfield* C. J. in *Knight v. Bate* (c), *Kitchin's Jurisdictions*, 162, *Com. Dig. Copyhold*, (D. 1), *Doe d. Milner v. Brightwen* (d).

*Cresswell* in reply cited, on the last point, 1 *Scriven* on Copyholds, 362 (b), and *Tiping v. Bunning* (e).

*Cur. adv. vult.*

LORD DENMAN C. J. in Trinity term, 1840, (June 24,) delivered the judgment of the Court as follows:—The judgment pronounced by the Court in this case having been founded on the want of any allegation in the special case, that the tenant-right estates of the manor of Lupton were estates of inheritance, the case has been amended in that respect, and a second argument has been heard. The allegation introduced by way of amendment is not very satisfactory; but the Court feel the force of an observation made by the counsel for the defendant (who introduced the amendment) viz. that, as the lessor of the plaintiff claims as heir, and must recover by the strength of his own title, the defendant must be entitled to the verdict, unless they are estates of inheritance, as asserted by the defendant.

It must, therefore, be taken that they are estates of inheritance; and the questions in the cause become as they were originally understood to be. First, whether the al-

1841.

DOE  
d.  
HAMILTON  
v.  
CLIFT.


(a) 5 T. R. 26.

(b) 3d ed.

(c) 2 Cowp. 741.

(d) 10 East, 583.

(e) Moore, 465; S. C. as *Gyphen v. Bawney*, Cro. Eliz. 504.

1841.  
  
 DOE  
 d.  
 HAMILTON  
 v.  
 CLIFT.


leged custom was proved; and, secondly, whether *James Satterthwaite* died seised, so that the custom, if proved, could operate. On the second question we are of opinion for the reasons given in the former judgment, that *James Satterthwaite* did die seised, so that the custom might operate; though that conclusion was not then drawn by the Court, it being unnecessary in the view then taken of the case. With regard to the first question, we are of opinion that the court rolls sufficiently proved one part of the custom, viz. that, in case a tenant died seised, leaving no children nor brother, but several sisters, the eldest sister should take, in exclusion of the younger sisters; and this was proved without the aid of the book and verdict papers, to which objection was made.

The proof of the other part of the custom, viz. that, if such elder sister died in the lifetime of the tenant, leaving a son, such son should, on the death of the tenant, take, in exclusion of the younger sisters, at first appeared to be more doubtful. But, on consideration, we think that this also sufficiently appears from the rolls, without the aid of the book or verdict papers, or the parol evidence of reputation. Looking at the rolls *alone*, in respect to the estate of the *Ashton* family, it appears that, on the death of *Hugh Ashton*, his son *James* was admitted to two cattlegates, as son and heir of his father; but the fine as to one was respited till the death of *Eleanor*, the widow of *Hugh*. It appears also that *James* died in the lifetime of *Eleanor*, leaving no child or brother, but several sisters, the elder of whom (*Mrs. Burrow*) was admitted as his heir to that cattlegate in his possession, and in respect of which he had paid the fine. *Mrs. Burrow* also died in the lifetime of *Eleanor*, leaving a son. And upon the death of *Eleanor* that son was admitted to the other cattlegate held by *Eleanor*, and to which his uncle *James* had been admitted, but the fine had been respited, although his mother (*Mrs. Burrow*) was never admitted to nor seised of it.

Without, therefore, entering into the question as to the admissibility of the other evidence, and not meaning to express any opinion against it, we think that the custom was well established, and that the lessor of the plaintiff, who claims as heir at common law, is not entitled.

And the result is, that a nonsuit must be entered.

Nonsuit entered.

1841.  
  
 Doe  
 d.  
 HAMILTON  
 v.  
 CLIFT.

The QUEEN v. The Guardians of the Poor of the  
 BRAINTREE UNION.

Saturday,  
 January 16th.

**MANDAMUS.** The writ recited an order of the Poor Law Commissioners to the guardians of the poor of the Braintree Union, in the county of Essex, to appoint a chaplain of the union, and to report to the commissioners his appointment and amount of salary. The time for the obedience to the order was enlarged by several subsequent orders. In the return it was stated that the said order had not been sent to one of the secretaries of state, although at the several times, simultaneously with the said order, an order in the same terms and to the same effect had been addressed to another union, viz. the Royston Union. And further, that there was a prior order of the commissioners still unrevoked, providing for the performance of the offices of religion within the workhouse, independently of any appointment of a chaplain, prescribing only that in case the guardians should deem it necessary to appoint one, he should be licensed and approved by the diocesan, and that, if the appointment should be deemed necessary, he should

It is not essential to the validity of any but general orders of the Poor Law Commissioners to the guardians of an union, that they should be submitted to the Secretary of State; 4 & 5 Will. 4, c. 76, s. 16.

If an order is directed to one union only, it is not a general order, though an order in the same terms is simultaneously directed to another union.

Under the stat. 4 & 5 Will. 4, c. 76,

s. 15, the commissioners have power to rescind or alter any order made by them, and an order, inconsistent to some extent with a former one, will have the effect of altering that former order, and will be valid itself.

Under the 46th section, the commissioners have power to order the guardians to appoint a chaplain. He is an officer under that section, "for carrying the provisions of the act into execution," the purview of the act shewing that it was intended by the legislature that spiritual functions should be performed in the workhouses, for the benefit of the paupers.

1841.

**The QUEEN**  
**v.**  
**The Guardians**  
**of the**  
**BRAINTREE**  
**UNION.**

perform certain specified duties, such as reading prayers and preaching, administering the sacrament, examining the children and visiting the sick paupers. The return then stated that the guardians, in the exercise of their judgment and discretion, did not deem it necessary to appoint a chaplain. It stated, as reasons for their judgment, that provision had been made for the performance of religious offices by the schoolmaster of the union, for the attendance of the paupers at the parish church and dissenting places of worship in the union; and further, that clergymen of the establishment and dissenting ministers within the union had been invited to perform spiritual functions in the workhouse, for the benefit of the poor, which invitation had been declined by the clergy, and accepted by the dissenting ministers, and that the majority of the paupers were dissenters, &c.

The validity of the return was now contested on a concilium, by Sir *J. Campbell* A. G. for the crown, and *Kelly* for the defendants.

It was conceded in the course of the argument that the first objection could not be supported, inasmuch as the order in question was addressed separately to one union, and therefore was not a "general rule," which, by the stat. 4 & 5 *Will.* 4, c. 76, s. 42, was defined to be a rule which at the time of issuing the same should be directed to and affect more than one union, and by the interpretation clause, section 109, to be "any rule relating to the management of the poor, in the execution of this act, which at the time of issuing the same shall be addressed by the commissioners to more than one union, or more than one parish or place not forming a union, or not to be formed into a union or added to one, by virtue of such rule."

With regard to the objection that the commissioners had previously issued an order investing the guardians with a discretion whether to appoint a chaplain or not, section 15 was cited, which authorises the commissioners to alter rules.

The judgment sufficiently shews the arguments on the main point, whether a clergyman was an officer whom the commissioners, under the stat. 4 & 5 Will. 4, c. 76, might direct(a) the guardians to appoint.

*Cur. adv. vult.*

1841.  
  
 The QUEEN  
 v.  
 The Guardians  
 of the  
 BRAINTREE  
 UNION.

Lord DENMAN C. J., on a subsequent day in this term (Jan. 28), delivered the judgment of the Court(b).—This was an argument on the return to a writ of mandamus, but it brought into question the validity of the writ, which directed the guardians to appoint a chaplain to a union workhouse, according to an order of the Poor Law Commissioners, on the ground that that order is not warranted by the act. The defendants denied that such a power is given by the act, and properly called on the prosecutors to shew what provision of the act could be carried into execution by the chaplain of a workhouse, as the paid officers to be appointed under the 46th clause must be appointed either with reference to the administration of the relief and employment of the poor, or to auditing of accounts, or to the general terms, “otherwise carrying the provisions of this act into execution,” and it was admitted that this appointment could not be referred to either of the two former objects.

The effect of these general terms was much considered in the recent case of *Reg. v. The Poor Law Commissioners, in the matter of the Cambridge Union*(c), and the language used by the judges on that occasion was pressed upon us in argument. We there held that the appointment of a collector of poor rates was not within those general terms, because there is no provision of the act which has any


(a) *Rex v. The Poor Law Commissioners, in re Newport Union*, 6 A. & E. 54, was cited to shew that if the commissioners had by law a discretion, this Court would

not review their exercise of it.

(b) Lord Denman C. J., *Littledale, Patteson and Coleridge Js.*

(c) 9 A. & E. 911; S. C. 2 P. & D. 323.

1841.

  
The QUEEN  
v.  
The Guardians  
of the  
BRAINTREE  
UNION.

reference to the collection of the poor rates, they being made and collected under other acts, and the act in question applying only to the expenditure of those rates, after they are collected. The only provision to be found in the act, which could authorise the appointment of a collector, was that respecting a union of parishes for the purpose of rating, in which case the rate would be made and collected under the act in question, and the cases of such unions afforded occasions on which the interpretation clause, containing the word "collector," under the head of "officer," might operate. The same interpretation clause, under the same head of "officer," has the word "clergyman," and applying the same tests as were applied in the case in 9 *A. & E.*, the result will appear to be very different. It is true that no provision is to be found in the act in question directly authorising the appointment of a chaplain, or even using the word "chaplain," or any word of a similar import, but the 19th section plainly shews the intention of the legislature, that the inmates of the union workhouse, of whatever religious persuasion, should have religious assistance from ministers of their own persuasion; it shews, moreover, that some *general* regulations for affording such assistance to the inmates were intended, as well as some exceptions and particular regulations in favour of those who dissented, and could not conscientiously reap the benefit of those general regulations. Then the 42d section, giving power to the commissioners to make rules and regulations for the government of workhouses, makes it further incumbent upon them to carry into effect the intentions of the legislature, as shewn in the 19th section. In these sections therefore are to be found the provisions of the act as to religious assistance and instruction to the inmates of the workhouse, and the 46th section gives the commissioners the means of carrying into effect those provisions in the only way in which it could be done beneficially, namely, by enabling them to call on the guardians to appoint a chaplain, with an adequate salary,

who by the interpretation clause comes clearly under the head of a paid "officer."

This is not the only instance of such indirect provision in this act. Medical attendance is evidently contemplated, yet there is no specific enactment as to the appointment of medical men, but they are included in the interpretation clause, under the head of "officer," in the same manner as "clergymen." Neither were chaplains of workhouses unknown to the law, for many local acts of parliament contain express provisions respecting their appointment. Indeed that circumstance was used in argument by the counsel in favour of the return, as furnishing something on which the word "clergyman" in the interpretation clause might operate, and so make it unnecessary to find any part of the act in question to which to apply it. But, whatever force may belong to that argument, it would be very strange if the act meant to give the commissioners, by express provision, a controul over chaplains under local acts, and not allow them to create similar duties and officers in the establishments which they were themselves to form. Remarks of this nature are by no means conclusive; we have no inclination to affirm judicially that the law has called a power into existence merely because there is a probability of its having intended to do so, or because it may have manifested the wish to have something done, for which that power would furnish the means; but we have no doubt that the religious instruction of the inmates was intended to be involved in the management of the workhouse, and that the legislature actually intended to give a general power to appoint chaplains, as it found that power existing in numerous parishes already.

Thinking that the commissioners have acted strictly within the 46th clause, this decision is by no means opposed by the *Cambridge* case (a), in which we thought their order was not within it.

We say nothing on the return, which merely offers rea-

(a) 9 A. & E. 911; S. C. 2 P. & D. 323.

1841.

The QUEEN  
v.  
The Guardians  
of the  
BRAINTREE  
UNION.



1841.

The QUEEN  
 v.  
 The Guardians  
 of the  
 BRAINTREE  
 UNION.

sons of expediency and policy against this particular exercise of discretion. Of such matters, those to whom the discretion is confided are the sole judges. Nor do we remark on the argument respecting the possibility of appointing ministers of particular sects or persuasions, the right question being that of appointing any clergyman.

Peremptory mandamus awarded (a).

(a) See as to the power of the commissioners under section 46, *Reg. v. The Poor Law Commissioners, Allstonefield Incorporation*, 11 A. & E. 558; S. C. 3 P. & D. 59.

*Reg. v. The Poor Law Commissioners.*

Wednesday,  
 January 13th.

B. L. HEWITT v. J. HEWITT.

After dissolution of partnership between A. and B. they referred all matters in difference between them to arbitration by a deed of submission, which recited that B. had deposited with C. & Co. (bankers), certain securities for advances to B.

**COVENANT** on a deed of submission to arbitration (b). The plea alleged the award to be bad for not deciding all matters in difference. The case was argued on demurrer to the replication in last Michaelmas term (c), by

*Crompton* for the defendant. [The argument, which turned principally upon the question as to the finality of the award, is fully stated in the judgment.]


(b) See the pleadings stated in the judgment.

(c) Nov. 10 and 13, before Lord Denman C. J. *Littledale, Williams and Coleridge* Js.

as surety for A., and that A. being indebted to C. & Co. in 4000*l.* B. had mortgaged to them securities for a sum not exceeding 3000*l.*; there was a proviso that if the arbitrators should award any money to be paid by B. to A. they should, if the mortgage were still outstanding, authorise such payment to be made to C. & Co. in reduction of the mortgage debts, and should further award that A. should, at a time to be named by the arbitrators, pay in to C. & Co. such a sum as would be sufficient to entitle B. to have the mortgage discharged, and the securities deposited by him released. The award found that 3221*l.* was due from B. to A. and that the mortgage was outstanding, and ordered B. to pay that sum on certain days, with liberty to pay it in to C. & Co. It also ordered that within one month from such payment A. should pay in to C. & Co. "such a sum as would be sufficient to entitle B. to have the mortgage discharged and the securities deposited by him released." *Held* bad for want of finality.

*R. V. Richards*, for the plaintiff, cited *Wharton v. King* (a) and *Golightly v. Jellicoe* (b).

*Cur. adv. vult.*

1841.  
  
 HEWITT  
 v.  
 HEWITT.

LORD DENMAN C. J. now delivered judgment as follows :—This was an action of covenant for non-performance of an award, the pleadings in which raised substantially the question of the validity of the award; and it will be necessary, therefore, that the purpose of the reference and the nature of the award should be explained. It appears, then, by the deed of submission of the 28th December, 1837, and the award of the 14th February, 1839, that, previously thereto, the defendant was the taker of lands, &c. in the county of Cornwall, productive of a mineral useful for certain purposes of manufacture, and that, about the year 1834 or 1835, the defendant admitted the plaintiff into partnership therein for 2000*l.*; and further, that, by agreement of 25th January, 1836, the defendant, having obtained letters-patent for the manufacture of a certain substance therein mentioned, had taken the plaintiff into partnership as therein specified, and that they did accordingly become partners, though no articles of partnership had been executed; and also that before the said agreement of the 25th January, 1836, the parties had dealings together; and that shortly after the said agreement, the defendant had deposited with *Cooke & Co.* bankers, certain securities for such sums *as they had or might advance* to defendant as surety for plaintiff; and that, plaintiff being indebted to them in about 4000*l.*, the defendant executed an assignment of certain securities for a sum not exceeding 3000*l.*; and further, that the said parties dissolved partnership on the 15th January, 1837, without any settlement of accounts between them then or before, by reason whereof they had agreed to refer all matters in difference to the three arbitrators therein named, with the powers and in the manner therein specified. Then comes a provision, which it will be necessary to state with more particularity; it is as follows :—“ And it

(a) 2 B. & Ad. 528.

(b) 4 T. R. 147, n.

1841.

  
HEWITT  
v.  
HEWITT.

is in the said deed of submission provided that, if the said arbitrators should award any money to be paid to the plaintiff by the defendant at any day therein named, the said arbitrators should in their said award (if the said mortgage to the said bankers should be still outstanding) authorise the payment thereof to the said bankers in reduction of the said mortgage debts, and should further award and direct that the said plaintiff should, at a time to be then named by them, pay in to the said bankers such a sum of money as would be sufficient to entitle the said defendant to have the estate comprised in the said mortgage released, and his title deeds and guarantees, given to the said bankers by way of deposit, restored to him." The award then proceeded to state the amount of debt on the partnership and private accounts from the defendant to the plaintiff to be 3121*l.*, and directed the payment to be made upon certain days and times to the plaintiff, with liberty to the defendant to make such payment to the said bankers in reduction and towards satisfaction of the said mortgage debt. And then is the following passage:—"And we do also order and award that the said *R. L. Hewitt* do and shall, within one calendar month from the day whereon the said *J. Hewitt* shall have so paid and satisfied the said sum of 3121*l.* and interest pay unto the said Sir *W. B. Cooke &c.*" (the bankers), "such a sum of money as will be sufficient to entitle the said *J. Hewitt* to have the estates comprised in the said mortgage released therefrom, and all his title deeds, guarantees and securities, of whatsoever kind or nature, given to the said Sir *W. B. Cooke*" &c. "by way of deposit, restored to him." The other directions contained in the award it is not necessary to pursue further, or to detail with greater minuteness.

The pleadings are as follows. The declaration assigns as a breach of covenant on the part of the defendant the non-payment of the sums of 1000*l.*, and of 500*l.* being the two first instalments directed by the award to be paid by the defendant to the plaintiff. The plea, after setting out the deed of

submission upon oyer, and also the award at length, states that at the time of making the said award there were, and yet are, divers assets and debts other than the said lands, places, takes, patents and materials in the said award mentioned, belonging to the said partnership; and that the said award is wholly bad and void in law. The replication alleges that no assets or debts other than the said lands and places, takes, patents and materials in the said award mentioned, belonging to the said partnership, were at any time before the making of the said award submitted to the decision of the said arbitrators, nor had the said arbitrators, at any time before the making of the said award, notice of any assets or debts other than the said lands, places, takes, patents and materials in the said award mentioned, belonging to the said partnership. To this replication there is a demurrer assigning several special causes.

The main question, however, discussed in the argument and now for our decision, is, whether the said award upon the face of it be good in point of law, the objection being that it has not disposed of and adjusted all matters in difference between the parties, and therefore is not final. It is obvious, from the terms of submission, that one important object, so far as the defendant is concerned, was to release him from the engagements into which he had entered with Messrs. *Cooke & Co.* the bankers, and to procure his securities, which he had deposited with them, to be restored to him. This is apparent from the provision that, if any sum should be awarded to be paid to the plaintiff, it might be paid by the defendant to the bankers in reduction of the balance due upon the advances made by them. And, if the payment of the whole sum awarded to the plaintiff must *necessarily* have had the effect of extinguishing that balance, it might perhaps have been reasonably contended that this purpose of the reference had been answered. The state of that account, however, and the sum actually due to the bankers are left in perfect uncertainty. That the sum of 4000*l.* was due from the plaintiff to them is certain; but

1841.

HEWITT

v.

HEWITT.

1841.  
HEWITT  
v.  
HEWITT.

how much more may have been advanced by them in addition and by reason of the securities deposited by the defendant does not appear. That there was some addition there is every reason to conclude, as it is stated expressly that the said securities of the defendant were deposited to cover "such sum or sums of money as the said bankers had then advanced or *might* thereafter advance." There seems to be no reason why the sum actually due to the bankers at the time of making the award might not have been precisely ascertained. That, however, has not been done in terms, nor can it be collected from any thing appearing upon the face of the award. A new and distinct inquiry beyond anything that has been done by the arbitrators is indispensable to fix the sum upon the payment of which the defendant would be released from his obligation and obtain the return of his securities; for which purpose *the plaintiff* is by the terms of the deed of submission, after payment made to himself of what is awarded to him, to pay to the bankers what is necessary. The award on this point runs thus:—*the plaintiff shall pay such a sum of money as will be sufficient to entitle the defendant*; as by the extract above set forth appears. Suppose now that the defendant had complied with all the terms imposed on him by the award, but that a sum was still due to the bankers, which the plaintiff ought to pay in order to release the securities, but refused to do so, what remedy would there be for him (the defendant) upon the deed of submission against the plaintiff for not paying into the said bankers "such a sum of money as will be sufficient to entitle" him to regain his securities, in the terms above quoted from the award? For want of sufficient distinctness and certainty upon this point there would be none: the investigation of all the accounts anew would become absolutely necessary; and almost every point that has been referred to the final decision of the arbitrators must be again made matter of evidence and discussion before a jury. We think that this matter was, by the plain meaning of the deed of submission, a matter to be deter-

mined conclusively by the arbitrators, and, therefore, that an important matter in difference between the parties has been left by them unsettled and undecided; or, in other words, that the award is not final. The consequence is that there must be judgment for the defendant.

1841.

HEWITT  
v.  
HEWITT.

A.

Judgment for the defendant.

The QUEEN v. KENDALL, Clerk.

**RULE** calling on the Rev. *John Kendall*, master of the hospital, called the Hospital of *Robert Earl of Leicester*, in Warwick, to shew cause why a writ of mandamus should not issue directed to him, commanding him to affix In pursuance of an act, 13 Eliz. the Earl of Leicester, by deed, founded an eleemosy-  
nary hospital, and made it a corporation by the name of the "Master and Brethren of the Hospital of," &c. By ordinances for the constitution and government of it, he fixed the number of the brethren, who were to be chosen by preference from poor persons disabled in the wars. The appointment of master he vested in his heirs, directing them however to appoint, if fit, the vicar of a neighbouring church. By deed he gave to the master and brethren to hold to their use and their successors for ever lands and possessions, amongst which was the advowson of a vicarage. By several ordinances he vested the government and control of the brethren in the master.

*Held*, that the master had no veto on the election of a presentee to the vicarage by the majority, and that his concurrence was not necessary to the validity of an election by the majority.

*Quere*, whether, if that had been made necessary by the founder, such a provision would not have been void by stat. 33 Hen. 8, c. 27, he not having been expressly authorised by the stat. *Eliz.* to make such a term in the deed of incorporation.

A writ of mandamus stated the election of a presentee by a majority of the brethren, and commanded the master, who had refused to affix the seal to an appointment, to do so:—*Held*, that an allegation in the writ was sufficient as to his power to affix the seal, which stated that he had the custody of one of the keys of the chest in which it was kept, and had positively refused to affix the seal, and claimed a right to withhold it.

The return set out the several instruments constituting the society, to lead to an inference that the master had a veto, and stated as a fact, that the master had always concurred in former elections:—*Held*, that this mode of setting up a right to a veto was evasive, argumentative and uncertain.

*Held*, that it was not necessary to tender to the master a deed of presentment for sealing, as the act was of so simple a nature that there could be no question about the terms of the deed, and the master had refused to seal any presentment.

*Held*, that, if the body had a right to revoke the appointment, such revocation was matter of return, and need not be negatived by anticipation in the writ.

*Held*, that the presentment being a right claimed by a stranger, the decision on the claim was not for the visitor.

*Held* finally, that the writ, being merely to affix the seal, might properly go to the master alone.

1841.

  
The QUEEN  
v.  
KENDALL.

or cause to be affixed the common seal of the master and brethren of the said hospital to a deed of presentation, presenting the Rev. *Joseph Ashby Morris*, clerk, to the vicarage of Hampton in Arden with Nuthurst, in the county of Warwick. The rule was obtained on affidavits that the said vicarage was in the patronage of the said hospital, alleged to be a corporation; that the Rev. Mr. *Morris* had been duly elected to be presented to the said vicarage by a majority of the corporation, notwithstanding which the defendant refused to affix the common seal to a deed of presentation. Besides a general statement of the refusal of the defendant to affix the seal to the presentation, there was the following specific affidavit of the attorney of Mr. *Morris* of his refusal to do so:—"That on the 16th day of November instant he called upon the Rev. *John Kendall*, the master of the said hospital, and saw him at his residence in the said hospital, and explained to the said *John Kendall* that deponent had called for the purpose of requiring that the common seal of the master and brethren of the said hospital should be affixed to a presentation to the vicarage of Hampton in Arden in favour of the Rev. Mr. *Morris*; and the said Mr. *Kendall* thereupon stated that deponent should apply to Mr. *Gregson*, meaning thereby the said Mr. *John Gregson* of Bedford-row; and deponent thereupon explained to the said *John Kendall* that he did not understand that Mr. *Gregson* was the adviser of the said corporation, and the said Mr. *Kendall* then said, addressing deponent, 'if your application is that I should affix the seal to a presentation, I shall decline to do anything of the sort;' and deponent then replied, 'my application is that you should affix the seal to a presentation in favour of the Rev. Mr. *Morris*; and probably you had better read the letter which I have given to you,' meaning thereby a letter which deponent had prepared to leave for the said *John Kendall* in case deponent should not have been able to see the said *John*

*Kendall* personally, and which deponent had given to the said *John Kendall* on being first introduced to him.

“That without waiting to read the said letter the said *John Kendall* replied to deponent, ‘then I decline to affix the seal.’ ”

The letter, which was set out in the affidavit, was to request the defendant to affix the seal to the presentation.

The principal point intended to be raised was, that the defendant, as master, had a veto upon the choice of the presentee by the majority of the brethren.

Sir *F. Pollock* and *Wightman* on shewing cause (a) took a preliminary objection. The affidavits do not state that a deed had been tendered to the master for the purpose of receiving the seal. It will be said on the other side, that the refusal of the defendant amounted to a dispensation of the tender; but it cannot have that effect here, for at the utmost a refusal is not evidence, for a jury, of dispensation. Such an inference cannot be here drawn. Who was to prepare the deed—who to be the parties—could not be known; there was no deed extant.

Sir *W. W. Follett*, with whom was *Cleasby*, contra. The defendant positively refused to affix the seal to any presentation. It is clear that he intended to refuse on grounds which had nothing to do with the terms of the deed of presentation. There was nothing to shew that *Mr. Morris’s* attorney might not have had a deed in his pocket.

He was then stopped by the COURT.

LORD DENMAN C. J.—The Court are of opinion that the rule should be made absolute. It is not necessary to

(a) On Monday, 11th January, before Lord *Denman* C. J., *Littledale*, *Patterson* and *Coleridge* Js.



1841.

*The QUEEN*  
v.  
*KENDALL*

decide the point made, that no deed was tendered on the ground that the refusal was a dispensation of the tender of it; it may be decided on another ground not pressed at the bar—that the act of presentation was so simple, that there could be nothing peculiar about it.

If an improper deed should be tendered, the defendant will not be in contempt for refusing to execute it.

Rule absolute.

The writ of mandamus was immediately issued. It was as follows:—To the Rev. *John Kendall*, master of the hospital called the Hospital of *Robert Earl of Leicester* in Warwick, greeting: Whereas we have been given to understand and be informed in our court before us that the vicarage of Hampton in Arden with Nuthurst, in the county of Warwick, for a long time now last past hath been and still is vacant, and that it doth of right belong unto the master and brethren of the said hospital to nominate and elect a fit person to be presented to the said vicarage; and whereas at a corporate meeting of the master and brethren of the said hospital duly convened and held for the purpose on the 2d day of October last, the Rev. *Joseph Ashby Morris*, clerk, was by the major part of the said master and brethren duly nominated and elected to be presented to the said vicarage, and in pursuance of such nomination and election the said *Joseph Ashby Morris* ought to have had a presentation sealed with the common seal of the master and brethren of the said hospital, that he may be thereupon instituted and inducted into the said vicarage: and whereas we have further been given to understand and be informed that you the said *John Kendall*, by virtue of your office of master of the said hospital, having the custody of one of the keys belonging to the chest wherein the common seal of the master and brethren of the said hospital is kept, and well

1841.

The QUEEN  
v.  
KENDALL.

knowing the premises aforesaid, and that the said vicarage is in danger of lapsing, have absolutely neglected and refused and still do neglect and refuse to put and affix, or cause to be put and affixed, the common seal of the master and brethren of the said hospital to a presentation for presenting the said *Joseph Ashby Morris* to the said vicarage, although you have been duly required on behalf of the said *Joseph Ashby Morris* so to do, in contempt of us, in breach of your duty as such master of the said hospital, and to the great damage and grievance of the said *Joseph Ashby Morris*, as we have been informed by his complaint made to us in this behalf; we, therefore, being willing that due and speedy justice should be done to the said *Joseph Ashby Morris* in this respect as it is reasonable, do command you the said *John Kendall*, as such master of the said hospital, firmly injoining you, that immediately after the receipt of this our writ you do without delay put and affix or cause or permit to be put and affixed the common seal of the master and brethren of the said hospital to a presentation for presenting the said *Joseph Ashby Morris*, clerk, to the said vicarage of Hampton in Arden with Nuthurst, pursuant to such nomination and election as aforesaid, that he the said *Joseph Ashby Morris* may be thereupon instituted and inducted into the said vicarage, or that you shew us cause to the contrary thereof; and how you shall have executed this our writ make known to us at Westminster on Saturday the 23d day of January instant, then returning to us this our said writ, and this you are not to omit. Witness, *Thomas Lord Denman*, at Westminster, the 11th day of January, in the fourth year of our reign.

The defendant returned that the said hospital was founded under the authority of an act of parliament, 13 *Eliz.*, intituled "An Act to licence the Earl of Leicester to found an Hospital," by which it was enacted, that he and his heirs, executors, &c. should have full power

1841.

The QUEEN  
v.  
KENDALL.

and lawful authority to erect, found and establish a hospital or maison Dieu within the said town of Warwick or in Kenilworth, at his choice, " for the finding sustentation and relief of poor, needy and impotent people, to have a continuance for ever, and that the same hospital or maison Dieu so founded should be incorporated and have a perpetual succession for ever, in fact, deed and name of such head member and members of poor, needy and impotent people as shall be appointed, assigned, limited or named by the said earl, his heirs, executors or assigns under his or their hands and seals ; and further, that the same hospital and maison Dieu should be named and called by such name as the said earl, his heirs, &c. should so limit, assign and appoint; and the same hospital or maison Dieu being so incorporated and named, should by the name of the incorporation thereof have full power, authority and lawful capacity and ability to purchase, take, hold, receive, enjoy and have to them and to their successors for ever, manors, lands, tenements and hereditaments set, lying and being within any county, &c., so that the same exceed not the yearly value of 200*l.* above all charges and reprises; and further, that the same hospital or maison Dieu being so incorporated, founded and named, shall have full power and lawful authority by the true name of the incorporation thereof to sue and to be sued, implead and to be impleaded, to answer and to be answered unto, in all manner of courts that then were or thereafter should be within this realm, as well temporal or spiritual, in all manner of suits whatsoever they might or should be; and that the same hospital or maison Dieu should have and enjoy for ever such a common seal or seals as by the said earl, &c. should be in writing under his or their hand and seal, &c. aforesaid named or appointed, whereby the head of the same incorporation, with the members thereof, should and might seal any manner of instrument touching the same incorporation, and the lands, tenements and other things

thereunto belonging, or in anywise touching or concerning the same; and further, should be ruled, ordered, directed and visited by such person or persons as should be nominated, assigned or appointed thereunto by the said earl and according to such rules, statutes and ordinances as should be set forth, made, devised and established by the said earl, or by his heirs or assigns, in writing under his or their hand and seal, any law, statute, custom, usage or other thing whatsoever to the contrary in anywise notwithstanding." The return then set out a deed of incorporation of the hospital by the said earl in the 28 *Eliz.*, which pursued the powers given by the statute. The deed declared it to be established "for the finding, sustentation and relief of poor, needy and impotent men, and especially of such as should be thereafter wounded, maimed or hurt in the wars in the service of her majesty;" that it should "consist of one master and twelve poor brethren." The first master was appointed, and the appointment of future masters declared to be in the earl, his heirs, or, in default of appointment within three months, then to be in the Bishop of Worcester for the time being, and the recorders of Warwick and Coventry, or any two of them. The poor brethren were to be appointed in like manner. "And, further, the said earl did thereby, and by the authority aforesaid, ordain, will and appoint, that the same master and brethren, and their successors, should for ever thereafter be and continue in deed, fact and name a body corporate and politic of itself for ever, by the name of 'Master and Brethren of the Hospital of *Robert* Earl of Leicester, in Warwick,' with perpetual succession, power to hold lands, &c., and power to sue and be sued in the corporate name; 'and the said master and brethren and the corporation aforesaid, and the lands, tenements and hereditaments thereof should be for ever thereafter ruled, governed, ordered and directed according to such rules, statutes and ordinances as were to these presents annexed, or at any time thereafter should be set forth, made, devised and

1841.

The QUEEN  
v.  
KENDALL.

1841.  
  
 The QUEEN  
 v.  
 KENDALL.

established by the said earl by writing or writings under his hand and seal."

The return then set out the ordinances made by the said earl(a).

The ordinances were to the following effect:—

1. The master and his qualities:—He was to be an ordinary preacher of God's word, liable to be deprived by the visitors if he were not, or if of evil life, &c.

2. Vicar of St. Mary's:—The ordinance reciting that it was a small vicarage annexed the mastership to the vicarage, the vicar being a fit person.

3. Oath of the master for the supremacy.

4. Oath of the master for the government of the house:—It was not to defraud the poor brethren, &c., and to keep the statutes.

5. Magistri sede vacante:—In such case vicar to be acting master.

6. Oath of the brethren:—They were to swear to be "obedient to the master in all lawful and honest things not contrary to the statute."

7. The number of the poor and their qualities:—They were to be twelve in number, poor and impotent persons, not having of their own to relieve themselves, as should thereafter be maimed or hurt in the wars, and especially such as should be under the conduct or leading of the earl or his heirs or their servants and tenants were to have the preference.

In default of military cripples, other poor persons might be appointed.

12. Repair to church by the brethren:—Absence from church made the offender liable to a fine of sixpence. They were to go to church "decently in their liveries."

A heretic, notorious blasphemer, drunkard or quarreller, for the first offence was to be sharply reprehended, for the second to be removed from his commons for fifteen

(a) By stat. 53 *Geo.* 3, some powers were conferred on the corporation that did not affect this question.

days, or to lose fifteen days' allowance; in which time, if he make his humble suit to the master, and reconcile himself to his brethren, shewing himself penitent for his evil example, then to be again received by the special assent of the master and most part of the brethren, or else to be removed for ever; and for the third fault to be ipso facto disabled to be a brother, and deprived for ever.

1841.  
  
 The QUEEN  
 v.  
 KENDALL.

15. Behaviour of the brethren to the master:—If a brother should behave himself “stubbornly, disobediently and contemptuously, or in any respect disorderly towards the master for the time being in check, taunt or slander, he is to be punished as in the last article for every several offence.”

No brother to lodge out of the house without leave of the master, go into the town without his livery, ride forth out of the town without special leave of the master, or without like leave keep a dog or hawk in the hospital.

22. Laundresses:—“That no brother take any woman to serve or tend upon him in his chamber without special licence of the master, nor any with such licence under the age of three score years, unless she should be his wife, mother, sister or daughter.”

22. Not to marry without special consent of the master.

27. Not to break hedges or steal the wood thereof, or beg; first offence, penalty eighteen pence; second, six shillings; third, expulsion.

28. No brother to give any railing words or uncharitable speech to the master, or to any of the brethren; for every such offence against the master three shillings, and against a brother sixpence.

31. The master to be resident in the hospital, and not to be absent above a week at a time without leave of the bishop, &c.

32. Visitors:—The Bishop of Worcester, the Dean of Worcester and the Archdeacon of Worcester were made visitors “to punish and reform all abuses and offences to be

1841.

  
The QUEEN  
v.  
KENDALL.

committed or done by the said master and brethren or any of them, and to see these ordinances duly executed."

34. Order of the lands:—The "master and brethren" were restricted to a term not exceeding twenty years for leases.

The return then stated, that the said earl by deed of the 30th November, 1585, did give, grant and confirm unto the master and brethren of the said hospital the advowson of the said vicarage, "to hold the same unto and to the use of the said master and brethren, and their successors for ever."

That the said master and brethren have ever since been and now are the true and lawful patrons of the said vicarage, and have from time to time presented to the same by writing under their common seal.

That such presentations and elections in respect thereof have been from time to time made by the said master for the time being and the said brethren, or the major part of the said brethren, that is to say, by the concurrent voice or consent of the said master and the said brethren, or the major part of the said brethren present at a meeting duly assembled for that purpose, and that no such presentation has been made with such consent and concurrence of the master, and that whenever the master for the time being has refused such consent to or concurrence in the nomination and election of any person for such presentation, the said master has also as of right refused to affix the common seal of the master and brethren of the said hospital, or to cause or permit the same to be affixed to the presentation of the person nominated and elected by the said brethren, or the major part of them, without such consent and concurrence of the said master, and that no such person has ever been presented to this vicarage by the nomination and election by the said brethren, or the major part of them, without such consent and concurrence of the said master.

The return then proceeded to state that *Henry Thicknesse*

*Woodington*, the last incumbent of the said vicarage of Hampton in Arden with Nuthurst, departed this life on the 28th day of August, in the seventh of our Lord 1840.

That on the 2d day of October, 1840, the said master directed the stewards of the said hospital to summon the brethren to a meeting to be holden in the prayer-hall of the said hospital.

That the brethren of the said hospital were then and still are twelve in number, and that on such summons all the brethren of the said hospital attended, except *Thomas Hays*, and that I, the said master, on meeting the said eleven brethren assembled in the said prayer-hall, asked each of the said brethren whom he desired to present to the said vicarage, and that nine of the said brethren then present, that is to say, *John Morris* the elder, *William Richards*, *William Manton* the younger, *William Manton* the elder, *Ham Smallwood*, *John Crowe*, *Thomas Webb*, *William Newman*, and *William Arnold* severally answered, *Mr. Morris* of Myton, meaning thereby the Rev. *Joseph Ashby Morris*, mentioned in the writ, to which this schedule is annexed, and the other two brethren present, that is to say, *John Morris* the younger, and *John Burton* respectively answered *Mr. Carles* of the High Church.

And I the said master did then, immediately, in the presence and hearing of the said brethren so assembled as aforesaid, refuse to consent to or concur in the nomination or election of the said *Joseph Ashby Morris* for the said presentation, or in presenting the said *Joseph Ashby Morris* to the said vicarage, but on the contrary thereof I then exhorted the said brethren to further consider the matter, so that the said vicarage might be presented to at a future meeting by me the said master and the said brethren, and declared that I would not join or concur in presenting the said *Joseph Ashby Morris*.

And I the said master having caused an entry of the proceedings at the said meeting to be made in the act

1841.

The QUEEN  
v.  
KENDALL



1841.

  
The QUEEN  
v.  
KENDALL.

book of the said hospital, wherein the solemn acts and proceedings of the said hospital and corporation are formally recorded and set down, and to be read over to the said eleven brethren, and signed by the stewards of the said hospital, and having also myself signed the same, did then declare the said meeting to be dissolved.

And I further certify and return that no proposition for nominating, electing, or presenting the said *Joseph Ashby Morris*, or any other person, to the said vicarage was at that meeting, or any other meeting, put to the vote, nor was any corporate act or resolution come to at the said meeting, or any other meeting of the said corporate body, for nominating, electing, or presenting the said *Joseph Ashby Morris* or any other person to the said vicarage, nor hath any such corporate act or resolution since been come to, nor was it at the said meeting, or at any other meeting of the said master and brethren, proposed and determined by a majority of the said master and brethren that the said *Joseph Ashby Morris* should be nominated, elected, or presented to the said vicarage, or that the corporation seal should be put to any instrument of presentation for the purpose of carrying any such proposition or determination into effect, nor was any deed or instrument of presentation whatever to the said vicarage tendered or offered to me for signature or sealing, or in any way produced to me at the said meeting, or at any time before the date, teste, and issuing of the said writ to which this schedule is annexed.

And I the said *John Kendall* do further humbly certify and return that I have not been directed or required by the said visitors of the said hospital or any of them to affix the said seal to any presentation whatever to the said vicarage, and that no complaint, appeal, or reference touching the presentation to the said vicarage, or any the matters aforesaid, has been made to the said visitors of the said hospital or to any or either of them.

And, for the causes above alleged, I cannot put or affix,

or cause or permit to be put or affixed, the common seal of the master and brethren of the said hospital to a presentation of the said *Joseph Ashby Morris* to the said vicarage of Hampton in Arden with Nuthurst, as I am commanded by the said writ.

1841.  
  
 The QUEEN  
 v.  
 KENDALL.

Sir *W. W. Follett*, with whom was *Cleasby*, obtained a rule to quash the return for insufficiency.

Sir *F. Pollock* and *Wightman* (Thursday, January 28th) appeared to shew cause, but the Court intimated that the argument might be more conveniently heard on a concilium, and that to prevent a lapse of the presentation it should be heard on the Wednesday following.

It was accordingly argued on a concilium at the sittings after this term, on Wednesday, February 3 (a).

Sir *W. W. Follett* for the prosecutor. This return is bad. It is evasive and argumentative. It professes to raise three points.

1. That the master has a veto in the appointment. If that is the answer, it ought to be distinctly so returned, that if it be not true the presentee may have an action for a false return. It does not state any distinct fact either by way of return or answer. It would be impossible to bring an action after such a return as this, which presents a mass of facts and leaves the inference from them to be drawn by the Court. Three suggestions of fact are made in the writ:—1. That there is a vacancy. 2. That the presentment is in the master and brethren. 3. That Mr. *Morris* was by the major part of the master and brethren duly presented to the vicarage. *Bac. Abr. (b)* collects the authorities. It is there said, “As every mandamus issues upon a supposal of some breach and disobedience of the

(a) Before Lord *Denman* C. J.,  
*Littledale* and *Patteson* Js.

(b) Mandamus (I). What shall  
 be a good return.

1841.

The QUEEN  
v.  
KENDALL.

law, or neglect of duty in the person to whom it is directed, the return thereto must be certain to every respect; and therefore it is said not to be sufficient to offer such matter as a person may falsify in an action, but also such matter must be alleged that the Court may be able to judge of it and determine, whether the party's conduct be agreeable to law or not." Here nothing is presented to the Court but evidence from which they are called upon to infer both the fact and the law. *Rex v. Mayor of Abingdon* (a) is a direct authority that the return ought to directly traverse the point of the writ, and not do so only by inference. In *Reg. v. The Mayor of Norwich* (b), to a mandamus to admit an alderman of Norwich, the return stated an election by the ward, and a rejection by the mayor and aldermen for want of qualification, and "because the prosecutor was turbulent and factious, and procured his election by bribery; et quod non fuit electus." The return was held bad, for "first they admit an election and avoid, and yet at last they return, there was no election at all." So here they admit an election by the brethren, and do not set up anything to avoid it. The same principles are assumed in *Rex v. Mayor of York* (c), *Rex v. Mayor of Ilchester* (d).

An election by a majority of the brethren was sufficient. It was not necessary that the master should concur. "With respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable, and many incapable, and a corporation aggregate of many persons capable, that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head beside, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part in the same manner as any other

(a) 1 *Ld. Raym.* 559.(b) 2 *Salk.* 436.(c) 5 *T. R.* 66.(d) 4 *D. & R.* 330.

individual; and, therefore, without a particular usage, or the express provision of a charter, he has no casting voice (a).” *Blackstone* lays it down to be incident to aggregate corporations, “that the act of the major part is the act of the whole.” In *Hascard v. Somany* (b), where the presentation of the parsonage of Haseley was in the dean and canons of Windsor, it was held, “that *primâ facie* in all acts done by a corporation, the major number must bind the lesser, or else differences could never be determined.” The case of *Rex v. Dr. Windham* (c) is directly in point. There the words of the statute were “*Hoc etiam volo, ut sollicitudine cautum sit, ut nihil sigilletur, quod non per gardianum et majorem partem sociorum mature deliberatum concordatur, et per eosdem comprobatur.*” Lord *Mansfield* was clearly of opinion that these words did not give the warden the negative. The case of *Queen’s College, Cambridge* (d), is relied on by the defendant, but it is quite distinguishable from this. An examination there of the language of the statutes of the college was considered by Lord *Lyndhurst* to shew that the phrase, “*præsident et major pars sociorum tam præsentium quam absentium,*” referred to the *individuals* by whom the election was to be made, and not to the *body* by whom the election was to be made. Here it is clear that the expression “master and brethren” refers to the body which constitutes the corporation. The lands of the corporation are so held by them, and there is nothing in the ordinances to shew that this advowson was held by them by a different tenure to that by which they held their other property.

2. It is clear that this being a dispute with a stranger was not a case for the visitor, *Rex v. Windham* (e); *Rex v. Vice-Chancellor of Cambridge* (f).

3. The objection that there was no deed of presentation was disposed of on the motion.

(a) Bac. Abr. Corporation E. 7.

(b) 1 Freem. 504.

(c) Cowp. 379.

(d) 5 Russell, 64.

(e) 1 Cowp. 377.

(f) 3 Burr. 1647.

1841.

The QUEEN  
v.  
KENDALL.

1841.

  
The QUEEN  
v.  
KENDALL.

*Wightman* for the defendant. The principal point intended to be raised by this return is whether the master has a veto. It is not contended that the master alone can act, but that neither the master alone nor the brethren alone can act: but that both must concur, as it was held the head and body must do in a similar case: *Queen's College, Cambridge* (a). The return is sufficient in point of form; it shews that according to the constitution of this society the concurrence of the master was necessary to a legal presentment of this benefice. "In order to support a return to a mandamus it is not necessary that every part of the return should be good" (b). All the reasons of convenience are in favour of requiring the concurrence of the master. It is clear that this society was of a purely eleemosynary nature, and it could never have been intended that the class of persons, whom it was thought necessary by the founder to restrain by express ordinance from begging and breaking hedges, should be intrusted, without any check, with the patronage of presenting to a valuable living. The thirty-first ordinance, requiring the constant presence of the master in the hospital, shews the intention of the founder to be that the brethren should at all times be subject to his discretion and government. The case of the *Queen's College, Cambridge*, was an authority that the intention of the founder, as collected from all the institutions of the society, must have effect. This is a stronger case, the master is not chosen by the hospital, but a different person altogether, and necessarily not previously connected with the society. But, whatever the merits of this question, it was one between the body and the head, which it was therefore for the visitor to decide. If the prosecutor has a right to a deed of presentment, this mandamus is informal, for it ought to be directed to the corporation, and not to the master alone, who, according to the suggestion of this writ, is merely a

(a) 5 Russell, 66.

(b) Per Lord Kenyon in *R. v. Archbishop of York*, 6 T. R. 493.

part of it. The writ does not even say directly that the master has the custody of the seal.

1841.  
  
 The QUEEN  
 v.  
 KENDALL.

Sir *W. W. Follett* in reply. If the writ is objectionable, an application ought to have been made to quash it. The objection comes too late after a return; *Rex v. Mayor of York* (a).

The proposition is now abandoned that the master has the sole disposal of this patronage; but it is said his concurrence is necessary. But, even if the ordinances were intended to give a power to the master to prevent the act of the majority taking effect, such ordinances are void to that extent by the stat. 33 Hen. 8, c. 27. Of that statute Dr. *Burn* (b) says, "the act seemeth to be expressed in terms somewhat inaccurate and confused; but the manifest intention is to establish the rule of the common law, that a majority of the body corporate should bind the rest. In some parts of the act the dean seemeth to be contradistinguished from the chapter; so as that the negative of the inferior number of the chapter only, exclusive of the dean, was hereby intended to be taken away; but the other parts of the act seem to explain this, expressing that all local statutes, whereby the grant, lease, or election of such corporation should be anywise hindered by any one, or more, being the lesser number of such corporation, contrary to the course of the common law, shall be void. And it is certain the dean is one, and but one member of the body corporate." He refers to a case of *Rex v. Dr. Bland*, 14 G. 2, in which all the points mooted in this case were made, but the mandamus issued, and the case appears to have gone no further. In that case the mandamus went to the head personally. He also refers to another case arising in 1761. Here the mandamus is to affix the seal, not to make election; that has been done, and

(a) 5 T. R. 66. This doctrine is over-ruled, at all events as to matters of substance, *R. v. Mayor of Newbury*, 1 G. & D. 388 &c.  
 (b) Ecc. Law, vol. ii. 117.

1841.

  
 The QUEEN  
 v.  
 KENDALL.

there is no power to revoke the determination, or, even if there were, that is not to be presumed; it would be matter to be returned.

*Wightman*, as to the effect of the statute, cited 1 *Bl. Com.* 478, that "this statute extends not to any negative or necessary voice given by the founder to the head of any such society" (*a*); and *Kyd* on Corporations, 311, in which the same opinion is expressed. He also referred to *Rogers v. Holled* (*b*) as an authority that a presentation might be revoked before institution.

*Cur. adv. vult.*

Lord DENMAN C. J., at the sittings after this term, delivered the judgment of the Court as follows.—To the writ in this case, commanding the master of the Earl of Leicester's Hospital at Warwick to affix the corporation seal to a presentation to the living of Hampton in Arden, in pursuance of a resolution of a majority to present the Rev. Mr. Morris, the prosecutor, a return has been made, and its validity argued before us. The writ stated the vacancy, that the advowson belongs to the corporation, and that Mr. Morris was nominated and elected by a majority of the corporation, that Mr. Kendall has the custody of one of the keys of the chest wherein the common seal is kept, and refuses to permit it to be affixed. The return is principally framed for the purpose of questioning the right of the majority to nominate and elect, and of asserting that the concurrence of the master is necessary. The mode of doing this in the return was strongly attacked, and doubtless as the right of the majority is denied it ought regularly to have been denied in direct terms, and not left to be inferred from any documents however conclusive. But we are not prepared to say that a return is necessarily bad by reason of this defect, if such facts should be set

(*a*) Professor *Christian* expresses a doubt of the correctness of this doctrine.

(*b*) 2 *Bl.* 1039.

forth as fully to convince the Court, in point of law, that the right does not exist as claimed. The question however as to the necessary form does not arise here, because we are clearly of opinion, after a careful perusal of the return, that the right is in the whole body, and must be exercised by the majority. The learned counsel for the defendant have not denied this to be the case with corporations in general, but they attempted to shew from particular provisions that the founder of this corporation must have intended to make the consent of the master essential to the due performance of any corporate act.

The answer is clearly correct, that their property, including this advowson, is vested in the master and poor brethren as a corporation. Whether the founder fully understood the consequence, that a majority would bind, or intended to entrust a veto with the master, is no more than speculation on an immaterial point. The arguments drawn from portions of the statutes are rather ingenious than conclusive; most of them may be urged on either side. But they are of no force to prevent the known incidents of a corporation from attaching to this body corporate, and, if Lord *Leicester* had intended them to have this effect, it may be questioned whether he could have done so by virtue of the act, which gives him the power to erect a corporation. All the authorities are consistent with what we have now said; the only two cases pressed upon us as seeming to point in a contrary direction—that of *Queen's College, Cambridge*, before Lord *Lyndhurst*, and that of *Catherine Hall*, before Lord *Eldon*,—do not arise in respect to corporations, and the bodies to which they relate are governed by statutes worded in a most peculiar form.

That part of the return which appears to set out that upon former vacancies the master has concurred in the presentation is by no means brought before us as it ought to be. At most the practice could only afford evidence of the right claimed by the master in contradiction to that asserted by the prosecutor in his writ, but when

1841.

The QUEEN  
v.  
KENDALL.



1841.

~  
The QUEEN  
v.  
KENDALL

examined it does not even amount to evidence, the facts not being distinctly alleged. This averment is justly stigmatised by the demurrer as argumentative and evasive, the argument is built on no foundation, and there is a semblance of controverting the writ without its being really controverted.

Another passage of the return appeared to question the fact of the prosecutor's presentation having been duly resolved upon by the majority of the corporation. That is the statement in the writ, the return alleges that no presentation has been made as a corporate act of the body. This alone would be undoubtedly bad for the uncertainty as to what the defendant might mean when he spoke of a corporate act. But he goes farther, detailing what in truth was done. The vacancy was declared, the question of presenting to it was put to the vote by the master himself, every brother being separately asked, at a meeting held for the purpose, for whom he voted. Nine voted for the prosecutor, the master and two brethren for another candidate. One brother was absent. The vote so taken was recorded in the book in which the acts of the hospital are preserved. After this solemn proceeding, it is plain that nothing remains to put Mr. Morris in the proper course for being instituted and inducted but that his presentation should be sealed. The resolution is a corporate act, if the body can act by a majority without the master's concurrence. The result is that the same question is again raised in a circuitous manner, which ought to have been brought forward directly in the return, and on which we have already pronounced our opinion.

The defendant's counsel however took some objections to the writ itself. First, his control over the seal was said not to be made sufficiently apparent, for the writ says only that he keeps one of the keys of the chest wherein it is kept. But we have no doubt that this exception cannot prevail after the return has admitted that defendant refuses to affix the seal, and claims the right to withhold it. Se-

condly, that no presentation has been offered to defendant—but when the rule was argued we gave our reasons for thinking this unnecessary. Thirdly, that the resolution of the majority may be rescinded by the same body. To raise any point on this objection, we think that the return ought to have shewn a change in their intention. Lastly, that the present dispute is altogether between the head and the members of this corporation, and ought to have been carried before the visitor. The prosecutor being merely a stranger to them and their proceedings, we are of the contrary opinion. The resolution of the majority, being in our judgment binding on all, has given the presentee an inchoate right to the living, which can only be defeated by the want of that formal act which the defendant refuses to execute. And this application has been made precisely in the same manuer as those which were successful in effecting the same object in the case of *Eton College* and the *Corporation of Bedford*.

1841.  
 The QUEEN  
 v.  
 KENDALL.

Peremptory mandamus awarded.

G.

NEALE v. POSTLETHWAYTE.

Thursday,  
 Jan. 28th.

**CRESSWELL** had obtained a rule to shew cause why an order should not issue from this Court directing the plaintiff to pay to his attorney the amount of his taxed costs in this cause.

Under the stat. 1 & 2 Vic. c. 110, s. 18, an attorney is entitled to a rule of Court having the effect of a judgment, directing his client to pay the amount of a bill of costs which has been taxed on the usual undertaking.

Sir *F. Pollock* shewed cause(a). This application is made in consequence of the passing of the stat. 1 & 2 Vict. c. 110, s. 18, which declares that all orders for payment of any sum of money by any courts of common law shall have the effect of judgments. Before that statute such an order

(a) Thursday, Jan. 21, before Lord *Denman* C. J., *Littledale*, *Patterson* and *Coleridge* Js.

1841.

NEALE  
v.  
POSTLE-  
THWAITE.

was never made or asked for, and this Court ought not to extend the effect of the act beyond the contemplated object of the legislature. A party, on obtaining the order to tax, undertakes to pay, and the practice has been to enforce that undertaking by attachment. Why should an attorney have immediate judgment for the amount of his demand any more than any other person ?

*Cresswell* contra. In *Jones v. Williams* (a), the Court suggests this very course, that a delinquent party should be called on to shew why he does not pay a particular sum of money, and says that in the event of the rule being made absolute, a writ of execution may go for the amount. The statute distinctly refers to orders of the Courts for the payment of costs. An attachment is an insufficient remedy. If a debtor is obstinate, he might go to jail and set his creditor at defiance. The plaintiff is a debtor under a rule of this Court, by which he has undertaken to pay the amount he should be found to owe. [Lord *Denman* C. J. We will confer with the other judges on this point; it affects the practice of all the Courts.]

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—In this case the bill of *Shaw*, the attorney of the plaintiff, has been taxed under an order made upon the usual undertaking, and an allocatur has been made by the master for     *l.* The money not having been paid, this application is made for a rule of Court, ordering the payment to be made, with a view to turn the debt into a judgment debt under the 1 & 2 *Vict.* c. 110, s. 18. And this is resisted on the ground that such a rule was never granted before that statute passed, and that it was not intended by that enactment to change the practice of the Court; that the attorney has at present the security of an attachment, and ought not at once, by being made a judgment creditor, to gain an advantage over the rest of the plaintiff's creditors.

(a) 11 A. & E. 178; S. C. 4 P. & D. 217.

We think, however, that this case is within the intention of the statute, which is a beneficial one, and ought to have full effect given to it. That no such rule should have been granted before it passed, is natural enough, as no benefit could before that have resulted from it. We may reasonably presume that an attachment would, under the circumstances of the present case, be unavailing, or there would be no motive for the application, and it is reasonable rather to advance the remedy against the property of the plaintiff, than to drive the attorney to proceeding against his person. And, as to other creditors, we are not informed of the existence of any, but, if there be any, and they have been remiss in prosecuting their claims, there is no injustice in allowing the attorney to profit by his superior activity. An attorney, whose bill has been taxed on an undertaking to pay what shall be found due, is a creditor entitled to the most favourable consideration.

G.

Rule absolute.

1841.

NEALE

v.

POSTLE-  
THWAYTE.

## TOWERS v. NEWTON, Esquire.

Monday,  
February 1st.

**RULE** (obtained January 13) to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, on account of the irregularity of the writ under which he had been arrested. An action had been brought, venue Yorkshire, against the defendant on which a part of the debt was levied. 6th July a ca sa. was issued into Middlesex reciting only the fi. fa., and the return of it. 31st August a like ca. sa. was issued into Yorkshire, under which the defendant was arrested, but discharged on the ground of privilege. Afterwards, on the 7th January, 1841, he was arrested on the Middlesex writ.

*Held*, 1st, that the Middlesex writ was irregular, as it did not contain a testatum clause of a writ into Yorkshire, and 2ndly, that the Court would not amend it, by inserting a testatum clause, the defendant having been actually arrested before any Yorkshire ca sa. issued, and the application for amendment being very late, the rule for the discharge of the defendant having been obtained 13th January, and the cross rule for amendment only on Saturday the 30th January, the day before the rule came on for argument.

1841.

TOWERS  
v.  
NEWTON.

a promissory note for 100/. A cognovit was given on terms which were not observed. On the 11th March, 1840, judgment was signed. A fi. fa. was issued into Yorkshire, and the sheriff returned that he had seized, that, after paying rent due, &c. he held but 20/. towards satisfaction of the execution, and as to the residue nulla bona.

After the return of that writ, a ca. sa. on the 6th July was issued into Middlesex. That writ recited the previous writ of fi. fa. into Yorkshire, and the sheriff's return of nulla bona beyond the amount seized, and commanded the sheriff of Middlesex to take the body of the defendant in execution for the residue. On the 31st August, a writ of ca. sa. with the same recital of the fi. fa. and return, was issued into Yorkshire, upon which the defendant was arrested on the 4th September. He was discharged from custody under that writ on the 25th September by a judge's order, on the ground that at the time of arrest he was privileged. On the 7th January, 1841, he was taken into the custody of the sheriff of Middlesex, from which it was now sought to discharge him, under the writ above mentioned, issued the 6th July.

It was contended that this writ was irregular, as not being founded in fact on any writ of ca. sa. previously issued into Yorkshire, the county in which the venue was laid; and that it was irregular on the face of it, as not being a testatum writ, professing to be founded on any such previous issue of a ca. sa. (a).


A cross rule had been obtained (Saturday, January 30), two days before this rule came on for argument, to amend the writ by making it a testatum ca. sa.

*Martin* shewed cause. The issue of the writ of fi. fa. into Yorkshire was sufficient to warrant a writ into any other

(a) It was also contended that the judgment was satisfied by the arrest under the Yorkshire ca. sa. from which the defendant had been discharged by a judge's order. On that point the Court did not give any opinion.

county in England, or even several writs at the same time. That seems to be the result of the authorities collected in *Tidd's Pract.* p. 995. A fi. fa. and a ca. sa. may issue at the same time, against the goods and person of the defendant: *Primrose v. Gibson* (a). Even if the writ is to be supposed founded on a ca. sa., previously issued into Yorkshire, it is no objection that no writ in fact was issued into that county. *Palmet v. Price* (b), *Esdaile v. David* (c). And even if in strictness this writ ought to recite the previous issue of a ca. sa. into Yorkshire, which is obviously a useless form, as no such writ need be issued, this Court will amend the writ by inserting the testatum clause. *Lush's Practice*, 502; *Meyer v. Ring* (d), *Cowperthwaite v. Owen* (e), *Milstead v. Coppard* (f), *Shaw v. Maxwell* (g).

Sir W. W. Follett contra. This writ is clearly irregular. It ought to have recited both the levy on the fi. fa. in Yorkshire, and also that a ca. sa. for the residue had been issued into Yorkshire. A ca. sa. was issued into Yorkshire, it is true, but that was after this writ, which could not have been founded upon, nor does it bear any testatum professing that it is founded on, any other ca. sa. All the books of practice state that the writ must have a testatum clause of a writ into the first county: *Lush's Practice*, 502. Here there is an admitted irregularity, which it is sought to amend by the cross rule obtained only last Saturday, (January 30), this rule was obtained on the 13th. The application is too late, and, if not, there is nothing to amend by. There is no case of an amendment where the party has been actually taken in execution under a writ which did not warrant his arrest at all. In *Shaw v. Maxwell* (g), in *Milstead v. Coppard* (f), and in *Cowperthwaite v. Owen* (e), there was a testatum clause. *Meyer v. Ring* (d) was an amendment of

1841.  
  
 TOWERS  
 v.  
 NEWTON.

(a) *Tidd*, 995; 2 D. & R. 193.

(b) 2 Salk. 589.

(c) 6 Dowl. P. C. 465.

(d) 1 H. Bl. 540.

(e) 3 T. R. 657.

(f) 5 T. R. 272.

(g) 6 T. R. 450.

1841.

~  
TOWERS  
v.  
NEWTON.

a writ of fi. fa., and the only point made was on a supposed irregularity of the writ, which had been sued out to warrant the amendment.

LITTLEDALE J. (*a*)—I am of opinion that this rule must be made absolute to discharge the defendant out of custody. The writ on which he was taken was not a testatum writ, as it ought to have been. To remove this defect, Mr. *Martin* on Saturday obtained a rule to amend it, by making it a testatum writ, but I think the application was very late. The defendant was arrested on the writ issued on the 6th July, and no writ of ca. sa. was issued into Yorkshire until the 31st August afterwards; the Middlesex writ therefore cannot be amended by that.

PATTESON J.—I am of the same opinion. The writ is clearly irregular. A testatum writ issues, because the writ into the first county is ineffectual, but, the testatum clause being omitted, there is nothing to shew that the judgment might not be satisfied by taking the defendant's body in that county. Since the stat. 3 & 4 *Will.* 4, c. 67, s. 2, writs of execution are tested on the day they are issued, and the ca. sa. into Yorkshire appears to have been issued long after the writ into Middlesex, on which the defendant was arrested.

COLERIDGE J. concurred.

G.

Rule absolute.

(*a*) Lord *Denman* C. J. was absent.



1841.

## LEWIS v. REILLY and WATSON (a).

**RULE** for judgment non obstante veredicto. Assumpsit on a bill of exchange drawn and alleged to be indorsed by the defendants to the plaintiff. It had been accepted and dishonoured. The fifth plea by the defendant *Reilly* was, that, at the time of the indorsement of the bill to the plaintiff, the partnership between himself and *Watson* had been dissolved, that the plaintiff had notice of such dissolution, and that the bill was indorsed by *Watson* to the plaintiff in the name of the supposed firm after the dissolution, without the privity, knowledge, or consent, and in fraud of him (*Reilly*) and for *Watson's* sole and separate purposes. The plaintiff took issue on the allegation of this notice of dissolution, and that issue was found against him. A rule was obtained to enter judgment for the plaintiff non obstante veredicto, against which

Notwithstanding a dissolution of partnership, one partner has authority to indorse, in the name of the partnership, bills drawn by the firm and accepted before the dissolution, and the partnership will be liable to a bona fide indorsee on such an indorsement, though he had then notice of the dissolution.

*Busby* shewed cause. The indorsement by one partner to the plaintiff after he had notice of the dissolution of the partnership does not bind the other partner, the bill being indorsed for the separate purposes of the former, and without the knowledge or assent of the latter. This principle is to be collected from the cases of *Shirreff v. Wilks* (b), *Swan v. Steele* (c), and *Ridley v. Taylor* (d). It is settled that after a dissolution one of the partners cannot accept bills in the name of the firm, though drawn before it, so as to bind them even against indorsees for value without notice; *Wrightson v. Pullan* (e), *Dolman v. Orchard* (f). If after a dissolution one of the partners carries on business in the name of the firm, he cannot bind the other parties by drawing or accepting bills in the name of the firm; *Newsome v. Coles* (g).

(a) Decided at the sittings after term (Feb. 2).

(b) 1 East, 48.

(c) 7 East, 210.

(d) 13 East, 175.

(e) 1 Stark. N. P. Ca. 375.

(f) 2 C. & P. 104.

(g) 2 Campb. 617.



1841.

LEWIS  
v.  
REILLY  
and  
WATSON.

*Humfrey* contra. The plaintiff is the holder of a bill drawn and accepted during the partnership. It was accepted, and was a good bill of exchange in their hands; it was payable to their order, and each member of the firm had authority to make the order, or, in other words, to indorse it in the name of the firm. The dissolution does not put an end to that authority. The delegation of authority to each member of a firm continues after a dissolution as to contracts entered into before it; as to them it may be said there cannot be a dissolution. [*Patteson* J. Every indorsing is a new drawing.] As against the indorsee, but that does not affect the liabilities before existing upon it. An indorsement may be for some purposes a new drawing, but it is not the less an indorsement, carrying all the consequences of an indorsement. [*Patteson* J. The bill does not state an indorsement for the separate debt of *Watson*.] No, "for his separate purposes;" and it is quite consistent with the allegation, that the appropriation of the proceeds by *Watson* may have taken place after, and, however that might give his partner ground of complaint, it cannot affect the rights of the plaintiff.


LORD DENMAN C. J.—The bill is admitted by the plea to have been duly drawn by the partnership, before the indorsement in fact. The partnership was dissolved, but the partnership could not be dissolved as to that bill; the rights of the partners as to it remained the same (a).

LITLEDALE J.—This bill was duly drawn and accepted during the time of the partnership. To make the bill im-

(a) In *Wood v. Braddick*, 1 Taunt. 105, per *Mansfield* C. J.—"The power of partners with respect to rights created pending the partnership remains after the dissolution." And per *Heath* J.—"Is it not a very clear proposition, that, when

a partnership is dissolved, it is not dissolved as to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue."

mediately available by a discount it must receive the indorsement of the firm. It is stated that the indorsement was made without the defendant *Reilly's* consent, but the plaintiff did not know that. He knew that the bill was well drawn, and did not know the other facts.

1841.  
  
 LEWIS  
 v.  
 REILLY  
 and  
 WATSON.

PATTESON J.—The plea to be valid ought to have gone much farther than it does, and shewn the indorsee to be so connected with some fraud as to have vitiated the indorsement to him. Notice of the dissolution was immaterial, if he took the bill *bonâ fide*.

COLERIDGE J. concurred.

Rule absolute.

There is a *Nisi Prius* case which, as reported in 3 Esp. 108, *Abel v. Sutton*, can hardly be considered law after the above decision. *Sutton*, the defendant, and *Paynter* had been in partnership under the name of *Sutton & Co.* A promissory note was drawn in their favour and delivered to them by another firm. After the dissolution, *Paynter* indorsed the note in the name of the firm, and afterwards died. In an action on the note against *Sutton* as the surviving partner, the defence was, that the note, though bearing date before the dissolution, was an accommodation bill, in fact made afterwards, and antedated, and it was contended

that, if not so, still the indorsement after the dissolution could convey no title. According to the report, Lord *Kenyon* held the first question of fact immaterial, saying, "If a fair bill existed at the time of the partnership, but is not put into circulation until after the dissolution, all the partners must join in making it negotiable. The moment the partnership ceases, the partners become distinct persons, are tenants in common of the partnership property undisposed of from that period; and, if they issued any securities which did belong to the partnership into the world after such dissolution, all must join in doing so."

G.



1841.

*Saturday,  
January 30th.*

On a contested election for the office of councillor of a borough, the mayor and assessors examined the votes to ascertain which candidate was elected, and pursuant to the stat. 5 & 6 Will. 4, c. 76, s. 35, the mayor, before two o'clock of the day next but one following the election, published the name of the candidate elected. After that time a further examination was made, and the mayor published the name of another candidate as the one elected:—  
*Held*, that the act done after two o'clock by the mayor and assessors was a nullity, and, the tender of his vote as a councillor by the candidate first named having been rejected, that he was entitled to a mandamus to compel the council to receive it, and

The QUEEN v. The Mayor &c. of LEEDS.  
Ex parte POTTS.

**RULE** to shew cause why a mandamus should not issue, commanding the mayor &c. of Leeds to receive the vote of one *Potts* at the meetings of the council of the borough. An election of two councillors had taken place on the 2d November, 1840, on which occasion there were four candidates. On the 4th November the mayor and assessors proceeded to examine the voting papers, pursuant to the stat. 5 & 6 Will. 4, c. 76, s. 35, and having rejected certain votes given for *Richardson*, one of the candidates, they declared *Potts* duly elected. The mayor, as directed by that section of the statute, published his name as duly elected before two o'clock on the said 4th November. On the same day the mayor and assessors proceeded to a further examination of the voting papers, and after two o'clock, that is to say, nine o'clock, they declared *Richardson* duly elected, and the mayor published his name as duly elected. On the following day both *Potts* and *Richardson* made the declaration required by the 50th section. *Potts's* demand to vote as councillor was rejected.

Sir *John Campbell* A. G. and *Wightman*, on shewing cause, contended that the question could not be raised by a motion for a mandamus; that the writ would not lie, there being a bonâ fide election of *Richardson*, and not a merely colourable one, and that the proper course was to proceed against *Richardson* by an information in the nature of a quo warranto, as he was entirely in possession of the office: *Rex v. The Mayor &c. of Oxford*(a). [*Patteson* J. In that case there had been an election in fact and in due form.]

(a) 6 A. & E. 349; S. C. 1 N. & P. 474.

that in such a case mandamus is the proper remedy, and not quo warranto.

*Addison* supported the rule.

1841.

The QUEEN  
v.  
The Mayor &c.  
of LEEDS.

Per CURIAM (a).—By the first declaration of the mayor, before two o'clock, the office was full. After that the mayor could do nothing, his subsequent declaration was a mere nullity.

G.

Rule absolute.

(a) Lord Denman C. J. Littledale and Patteson Js.


ELIZABETH SQUIRE and another, surviving Executrix and Executor, v. HUETSON and another.

Monday,  
January 25th.

**INTERPLEADER** rule. The facts, which were undisputed, were as follows:—On the 13th Feb. last, the above plaintiffs signed judgment and levied a writ of fi. fa. on the goods, chattels and effects of the above defendant, *Wm. John Huetson*, for the sum of 600*l.* and upwards, on a joint and several warrant of attorney, bearing date the 10th April, 1833, given by both the above defendants to *James Squire*, since deceased, for securing the payment of the sum of 900*l.*, on the days and times and in manner as therein mentioned. On the 31st March a writ of summons was duly issued against *Huetson*, at the suit of *Thomas Johnson*, for the recovery of the sum of 30*l.* 18*s.* 6*d.*, the balance due to the said *T. Johnson* on a certain bill of exchange, accepted by the defendant, to which writ the defendant appeared. Defendant having made default in payment of the said debt with costs on the day appointed by a judge's order obtained by the defendant, final judgment was signed, and a writ of *capias ad satisfaciendum* was issued thereon, pursuant to the terms of the order, under which the defendant was taken in execution and went to Whitecross Street Prison. On the 7th April the defendant filed his petition in the Court for Relief of Insolvent Debtors, in specie, as much as if it were money realised for goods seized and sold

An execution by writ of fi. fa., founded on a judgment upon a warrant of attorney, may be apportioned so as to entitle the plaintiff to the proceeds of any money actually in the hands of the sheriff, though before the writ be completely satisfied a vesting order under the Insolvent Act is made, which prevents any further execution of the writ in favour of such judgment creditor, under the stat. 1 & 2 Vict. c. 110, s. 61.

In such a case the plaintiff becomes entitled to money seized by the sheriff under the writ.

1841.  
  
 SQUIRE  
 v.  
 HUETSON.

and on the same day the property and effects of the defendant became vested, by an order of that Court, in *Samuel Sturgis*, the provisional assignee of the Court, and on the same day notice was given to the sheriff of Middlesex to withdraw from the possession of the effects of the defendant under the execution levied by the plaintiffs on the 13th February. On the 16th June, the defendant was brought up in custody before the said Court, and applied to be discharged under the said act, when the defendant was heard on the matter of his said petition, and was ordered to be discharged accordingly. By an order of the said Court, dated the 22d July, in the matter of *W. J. Huetson*, after reciting that by an order of the same Court, bearing date the 7th April then last, and entered of record in the same Court, the estate and effects of the said insolvent debtor were vested in *S. Sturgis*, Gent., provisional assignee of the estate and effects of insolvent debtors in England, pursuant to the provisions of the statute in that behalf, it was ordered that a *Mr. Robert Hanbury* should be, and the said *Robert Hanbury* was, thereby appointed assignee of the estate and effects of the said *W. J. Huetson*, for the purpose of the said statute for the relief of insolvent debtors.

On the 22d June, the following letter was written by a *Mr. Hugh Parnell* to *Mr. Chamberlain*, the plaintiff's attorney:

“ Church Street. Spitalfields, June 22d, 1840.

“ *Squire v. Huetson.*

“ Sir,—I beg to inform you that *Mr. R. Hanbury*, one of the well-known firm of Messrs. *Trucman, Hanbury, Buxton & Co.*, was, on the 16th June instant, appointed assignee of the estate and effects of the defendant by the Court for the Relief of Insolvent Debtors. I am informed that there is in the hands of *Mr. Lockett*, the sheriff's officer, a considerable sum, amounting to about 550*l.*, received by him while in possession of the insolvent's effects under the execution levied at the suit of the clients. As there appears to me to be no doubt that the execution cannot be sustained, I shall feel obliged by your informing me if it is your inter-

ion to resist the claim of the creditors to have the sum in question divided amongst them. Waiting the favour of your reply.

I am, sir, your's obediently,

*H. Parnell.*"

1841.

SQUIRE

v.

HUETSON.

An interview afterwards took place with Mr. *Chamberlain*, when it was agreed that application should be made to one of the judges of this Court for an order on the subject, and accordingly an order was made by the Honourable Mr. Justice *Littledale*, in the words or to the effect following, that is to say,

|                                                                                                                                 |   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|---------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><i>Squire and another, surviving</i><br/> <i>Executrix and Executor,</i><br/> <i>v.</i><br/> <i>Huetson and another.</i></p> | } | <p>Upon hearing the attornies<br/> or agents for the plaintiffs, the<br/> claimant and the sheriff of Middlesex, and by consent, I do order that the said sheriff do pay into Court the monies realized by him under the execution herein to the 7th April last, amounting to the sum of 390<i>l.</i>, to abide the decision of the Court as to the right of the plaintiffs or of <i>R. Hanbury</i>, the assignee of the defendant <i>Huetson</i>, an insolvent debtor, to the same; and the said sheriff do pay and deliver over the monies realized since the said 7th day of April, and also the remainder of the property of the said insolvent to the said <i>R. Hanbury</i>, as such assignee as aforesaid."</p> |
|---------------------------------------------------------------------------------------------------------------------------------|---|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

On the said order being obtained, the sheriff on the following day paid to the said *R. Hanbury*, as such assignee, the monies realized by him under the said execution, since the 7th day of April, up to the date of the said order, and thereupon withdrew from the possession of the estate and effects of the insolvent under the execution, and also paid into Court the before-mentioned sum of 390*l.* to abide the decision of the said Court, as directed by the said order. The said sum so paid into Court as aforesaid, consisted partly of monies received by the sheriff on the sale of sundry articles sold in the shop of the insolvent, but principally of monies received from various persons for the redemption of pledges previously made with insolvent, in his trade as a pawnbroker.

1841.

~~~~~  
 SQUIRE  
 v.  
 HUETSON.

*Warren* for the assignee(a). There are two objections to the right of the plaintiff. First, this was money received to relieve goods in possession of the defendant from a lien. The goods themselves were not liable to be taken in execution in respect of the lien of the defendant upon them. "The sheriff cannot take goods in pledge"(b); this money represents the goods, and the plaintiff therefore has no right to retain it against the assignees of the defendant, who would have been entitled to the goods if it had not been for this wrongful execution. [*Patteson* J. The money when paid by the owners to redeem their goods was seizable by the sheriff under s. 12 of the stat. 1 & 2 Vict. c. 110.]

Secondly, the stat. 1 & 2 Vict. c. 110, s. 61, enacts, "that in all cases where any prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem* or bill of sale, whether for a valuable consideration or otherwise, no person shall after the commencement of the imprisonment of such prisoner avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, or of such bill of sale, either by seizure and sale of the property of such prisoner or any part thereof, or by sale of such property theretofore seized or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under this act."

A writ of execution is an entire thing, *Clark v. Withers*(c); and, as it is clear that the plaintiffs cannot avail themselves of it as to the levy after the 7th April, the

(a) Before Lord Denman C. J.,  
*Littledale, Patteson and Col-*  
*ridge* Js.

(b) Com. Dig. Execution, C. 4.  
 (c) 1 Salk. 323; 2 Tidd, 114,  
 8th ed.

date of the vesting order, they cannot sever the execution, so as to make it good for the levy before that time.

The execution was not completely satisfied before the right of the assignees accrued; that right will overreach the plaintiffs' interest on the execution; *Smallcomb v. Cross*(a), *Toussaint v. Hartop*(b), *Moreland v. Pellatt*(c).

*Barstow* contra. This was not the ordinary case of a lien, it was a pledge, which the pawnee would have a power on a certain event to sell, *Legg v. Evans*(d).

The provision in the statute 1 Vict. c. 110, s. 61, has the same effect as to insolvency as the stat. 6 Geo. 4, c. 16, s. 108, has as to bankruptcy; and the decisions on the latter act are applicable in putting a construction on the former. The language of the two enactments is not precisely the same, but it was intended to have the same effect; *Wymer v. Kemble*(e) and *Notley v. Buck*(f) shew, that, where the sheriff has sold the goods under the execution, the subsequent bankruptcy does not overreach it. After such sale there is no longer any debt.

But here it is said that the execution is an entire thing; if so, it might be contended that the plaintiff would be entitled to the whole of the levy as well after the 7th April as before; but it is not so; the judgment of the Court in *Swain v. Morland*(g) assumes, as beyond a doubt, that, where there has been a partial sale under a writ of execution, this would be pro tanto a complete satisfaction of the writ, and consequently a bar even to an extent of the crown, tested after such partial sale of a levy. *Higgins v. M'Adam*(h) is a distinct decision that an execution may be so apportioned as to give the plaintiff the amount

1841.

SQUIRE  
v.  
HUETSON.

(a) 1 Ld. Raym. 251.

R. 511.

(b) Holt, N.P.C. 335.

(f) 8 B. &amp; C. 160; S.C. 2 M.

(c) 8 B. &amp; C. 727; S.C. 3 M

&amp; R. 68.

&amp; R. 411.

(g) 1 B. &amp; B. 378; S.C. 3 B.

(d) 6 M. &amp; W. 40.

Moore, 740.

(e) 6 B. &amp; C. 479; S.C. 9 D. &amp;

(h) 3 C. &amp; J. 1.



1841.

  
 SQUIRE  
 v.  
 HUETSON.

sold before an act of bankruptcy, and to the assignees the residue. The assignees here had no title until the vesting order of the 7th April; *Woodland v. Fuller* (a).

*Warren* in reply (b). The cases on the bankrupt act decide that, where an execution is completely satisfied, the plaintiff ceases to be a creditor having security; but here he was still a creditor on a judgment on a warrant of attorney unsatisfied. [*Patteson* J. The words of the statute are, that he shall not avail himself of any execution; the money claimed by the plaintiff was in the hands of the plaintiff before the vesting order.]

*Cur. adv. vult.*

Lord DENMAN C. J. (Feb. 1) delivered the judgment of the Court.—This was an attempt by the assignee of an insolvent to compel the sheriff to pay him 390*l.* obtained under an execution against him, he having given the plaintiff a warrant of attorney to secure his debt.

The sheriff had taken possession in February, the insolvent went to prison in March, and the vesting order was made on the 7th April. The insolvent was a pawnbroker, the money was received by the sheriff for the redemption of pledged goods. These facts were said to bring the case within the 61st section of the act for abolishing arrest, which forbids the creditor, to whom a warrant of attorney shall have been executed, where a vesting order shall have been made, to avail himself, after the commencement of the imprisonment, of any execution either by seizure or sale of the property, or by sale of it, if theretofore seized.

We are clearly of opinion that this money does not come under either of these descriptions, for the money was received before the commencement of the imprisonment, and was received to the use of the plaintiff without any further act by the sheriff.

(a) 3 P. & D. 570.

(b) Cause was shewn in the first instance.

The sheriff had also received money subsequently to the *imprisonment*, which it was not contended he could retain; but for the assignee it was said that the execution was entire, and that, if *all* the levy could not be retained, no part of it could. Without deciding upon the *ground* of this objection, and assuming an execution to be entire, it appears to us, that, if that be so, the execution having been well commenced, would have been well continued at common law; and the utmost effect that can be given to the 61st section of the act of parliament in question cannot overreach any thing done before the imprisonment of the insolvent. The rule must be discharged.

1841.

SQUIRE  
v.

HUETSON.

Rule discharged.

G.

## The QUEEN v. The VICTORIA PARK COMPANY.

**CRESSWELL** had obtained a rule calling upon the Victoria Park Company to shew cause why a writ of mandamus should not issue directed to them, commanding them to pay to *Joseph England*, or his attorney, the sum of 1176*l.* 0*s.* 4*d.*, being the amount of the actual debt due from the said Company to the said *Joseph England*, upon a judgment recovered by him in an action in her majesty's Court of Common Pleas at Lancaster, at the suit of the said *Joseph England*, against *John Westhead*, treasurer of the said Company, as the nominal defendant, for and on behalf of the said Company, and also the further sum of 10*l.* 7*s.* 2*d.*, being the amount of the costs and charges of the said *Joseph England*, adjudged to him in the said action, and to raise the same, (if necessary), by enforcing payment of all, or a sufficient part of any money which may be due, and in arrear from any person or persons upon and in respect of any call or calls which have been made by the directors of the said Company, under the authority of and pursuant to a certain act

Monday,  
January 11th.

Where a plaintiff has obtained judgment against a corporation, the Court will not issue a mandamus to them ordering them to pay the amount of judgment merely on the ground that an execution may turn out fruitless.

Where the directors of an incorporated company, authorized to make calls on the shareholders, had made such calls, but they had not been

paid, and the original directors had all ceased to be so, and no new directors had been appointed, the Court refused a mandamus to compel the Company to enforce the payment of the calls that had been made. (*Quære*, see the rule, and the judgment.)

1841.  
  
 The QUEEN  
 v.  
 VICTORIA  
 PARK  
 COMPANY.

of parliament, made and passed in the seventh year of the reign of his late majesty King *William* the Fourth (a), entitled "An Act for establishing a Company for the purpose of laying out and maintaining an ornamental Park within the Township of Rusholme, Charlton upon Medlock, and Mapside in the County of Lancaster," or by any other ways or means by the said act of parliament authorized or directed in that behalf.

It appeared, from the affidavits, that the Company being indebted to Mr. *England* in the sum of 1176*l.* 0*s.* 4*d.*, for work done, and for goods sold, he commenced an action against them in the name of their treasurer, and recovered judgment for that sum, and 10*l.* 7*s.* 2*d.* costs, which judgment still remained unsatisfied, that the secretary had stated that the Company had no funds to pay the debt, and no means of raising any, unless the shareholders paid up the calls; that the houses belonging to the Company were mortgaged to their full value; that most of the original directors had ceased to be so, by bankruptcy, resignation or otherwise; that there had been no new directors appointed; and that there were not enough left to form a quorum; that about 20,000*l.* was due upon calls that had been made, and that several of the shareholders were solvent, and able to pay their calls.

Sir *W. W. Follett* and *Wightman*, in last Michaelmas Term (b), shewed cause, and distinguished the case from *Rex v. St. Katherine's Dock Company* (c), and *Rex v. The Nottingham Old Waterworks' Company* (d).

*Cresswell* and *Knowles*, in support of the rule, cited *Rex v. Market Street, Manchester, (Commissioners)* (e).

*Cur. adv. vult.* (f).

(a) Chap. 30.

& M. 121.

(b) November 16th, before  
 Lord Denman C. J. *Littledale*  
*Williams* and *Coleridge* Js.

(d) 6 A.& E. 335; 1 N.&P. 480.

(e) 4 B. & Ad. 333, n.

(c) 4 B. & Ad. 360; S. C. 1 N.

(f) The arguments are so fully  
 stated in the judgment, that it was

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was a rule for a mandamus to be directed to the Company, commanding them to pay a sum of money recovered against them in an action, and to make calls for the purpose, if necessary, on the shareholders. The Company is incorporated by act of parliament, but by a clause in the act (sect. 74) they may be sued in the name of their treasurer, or one of the directors, as nominal defendant, and the officer so sued is made not personally liable. This action was accordingly brought against the treasurer, and the plaintiff having recovered 1156*l.* has entered it up against the Company. Upon an application to the secretary for payment, the answer given was, that the Company had no funds, unless the shareholders would pay up calls, which were in arrear to a considerable amount; and that, as to new calls, they could only be made by the directors, of whom there did not remain a qualified quorum. The plaintiff, therefore, who has a good cause of action against the Corporation, and has established it by the judgment of a court of law, is left without any satisfaction. The authority of *Rex v. St. Katherine's Dock Company* (a) was relied on, in support of the application, and that case, of which we see no reason to diminish the authority, would be precisely in point, if the judgment had not here been entered up against the Company. But assuming the judgment to be correctly entered up in that form, and we think it does not lie in the mouth of the plaintiff to contend that it is not, it seems to us to form a decisive answer to the first part, at least, of the application, because the plaintiff then

not thought necessary to repeat them here. The following sections of the act were referred to: sec. 10, by which the directors were empowered to pull down houses, and form the park, squares, &c., (this was referred to, in order to shew that, though the Company had no funds in hand, they might have other property, which might be

taken in execution, viz. the materials of such houses,) section 34, by which the directors were empowered to make calls, and 74, by which actions, suits &c., were to be prosecuted in the name of the treasurer, or one of the directors.

(a) 4 B. & Ad. 360; S. C. 1 N. & M. 121.

1841.

The QUEEN  
v.  
VICTORIA  
PARK  
COMPANY.

1841.

The QUEEN  
v.  
VICTORIA  
PARK  
COMPANY.

has the ordinary legal remedy of an execution; and we cannot direct a mandamus to go, ordering the payment to be made, merely because under the circumstances the execution may produce no fruits. It was argued that we have issued the writ even where there was a legal remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not *in its nature* so complete, without reference to any circumstances peculiar to the case in which it was to be used, as in *Rex v. Severn and Wye Railway Company (a)*, where a mandamus was granted to compel a corporation to reinstate and lay down a railway, although an indictment would have lain for the non-repair, for the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought and were entitled to. But here the plaintiff seeks only the payment of the debt and costs; for this an execution by *fi. fa.* is a perfect remedy in its nature, and if we were to issue the writ, because in this particular case there are no corporation chattels seizable, it would be difficult on principle to refuse to issue it in any case where the sheriff should return *nulla bona*, whether the writ had issued against a corporation or an individual, for in principle there is no distinction between the two.

We are compelled, therefore, to refuse the rule for a mandamus to the corporation to pay. We might, perhaps, if the facts had warranted us, have made the rule absolute in them for the latter part, the making a call on the shareholders; for this is not the case of an ordinary corporation, possessing, or supposed actually to possess, corporate property, and with which individuals contract on the faith of such present possession, but a corporation with a power of creating a future corporate property from time to time out of the private assets of its individual members, and with

(a) 2 B. & Ald. 646.

which contracts are made on the faith that an honest exercise will be made of such power when necessary. If, therefore, it were clearly established that they were evading the payment of their debts, and the due satisfaction of judgments recovered against them, on the ground that they had no corporate assets actually in possession, we should not perhaps go beyond the principle, which regulates our extraordinary interposition by mandamus, if we compelled them to exercise that power with which the legislature has trusted them for this very purpose, and to put themselves in funds to answer the demands of their creditors. We think it right to state thus much, to guard against a misconstruction of our present judgment, and wishing to leave the Court entirely unfettered, should such a case as we have supposed be brought before us; but, in the case now under consideration, it was distinctly admitted by the counsel for the rule, that a mandamus to make calls was unnecessary, because they had already been made to a sufficient extent; and it also appeared that practical difficulties might arise, from the present state of the corporation, in attempting to obey a mandamus so couched. It was suggested that the real remedy would be, the compelling the corporation to enforce the payment of the calls already made, and that no difficulties, either technical or substantial, existed to prevent this being done. How this may be we know not; but, for the present, it is enough to say that that does not appear to have been the application made to the corporation, nor is it a part of (a), or consistent with, the present rule, which must therefore be discharged, but without any costs.

*A.*

Rule discharged accordingly.

(a) See the statement of the rule, p. 639, *ante*.

1841.

The QUEEN  
v.  
VICTORIA  
PARK  
COMPANY.

1841.

Thursday,  
January 28th.

A declaration in case for a malicious prosecution for perjury, in one count, set out ten assignments of perjury, which were alleged to have been prosecuted maliciously and without probable cause; at the trial the plaintiff failed in proving want of probable cause as to nine of the assignments. He obtained a verdict with damages, on the tenth assignment.

*Held*, that he was not entitled to the costs of witnesses called to give evidence of want of probable cause as to those nine; and that the defendant was not entitled to the costs of witnesses subpoenaed by him to shew probable cause as to those assignments.

### DELISSER v. TOWNE.

**RULE** to shew cause why the master should not review his taxation of the costs in this case, and allow the defendant the costs incidental to certain assignments mentioned therein.

Case, for a malicious prosecution for perjury. The indictment, out of which these proceedings arose, was for perjury, alleged to have been committed by the plaintiff as a witness to the incompetency of one *Simmons*, a testator, in a cause of *Doe d. Carter v. Jones*. The declaration, which was in one count, alleged ten assignments of perjury in the indictment to have been made without reasonable or probable cause. The plaintiff at the trial failed in proving want of probable cause as to nine of them, but he obtained a verdict as to the last assignment. The master, in taxing the costs, allowed the plaintiff the costs of the witnesses called, as well of those to prove want of probable cause as to the nine assignments, as of those to prove it as to the tenth, on which he succeeded. The ten assignments of perjury set out in the declaration were, that the plaintiff had sworn falsely in saying—"That he never had any conversation with the defendant, in which and in substance he said to the defendant that he gave up the said *John Simmons*, and that he thought the said *John Simmons* would not recover, and that the said *John Simmons* ought to make his will; That he, plaintiff, did not, at any time between the 2d of January or the 3d of January, 1835, and the moment of the death of one *John Simmons*, say that the will of the said *John Simmons* ought to be made, or any thing to that effect; That he the plaintiff on the 2d January considered the said *John Simmons* incompetent to make a will, that the plaintiff had always since the time of his attendance on the said *John Simmons*, been of the same opinion as to his incompetence to make a will; That he had always been of the same opinion during the last illness of said *John Simmons*, and that plaintiff had never said the

contrary; That the plaintiff had not said anything importing capability at any time during the last illness of said *John Simmons* of his making a will; That the plaintiff had made a statement to the effect that one Major *Revell* had said to plaintiff that the best thing he plaintiff could do was to give Mrs. *Revell* a dose of prussic acid, and that the plaintiff did not afterwards confess that that statement so made by him was untrue; That plaintiff had never said that he had procured a child to be palmed off upon a husband as the child of his wife, and that the said child had been brought up in the family; That he, plaintiff, had never said that he had borne any part in such a transaction; That plaintiff did not on the 3d January, 1835, being the day when Dr. *Elliotson* was sent for and came to meet in consultation with plaintiff on the illness of said *John Simmons*, say that there was nothing serious the matter with said *John Simmons*, except that at his age every thing was serious; That he, plaintiff, had become a bankrupt, but that he did not know what dividend he had paid under his bankruptcy, and that he could not tell whether he had paid any."


1841.

DELISSER  
v.  
TOWNE.

Sir *F. Pollock* shewed cause (a). The case of *Reed v. Taylor* (b) decided that if a man prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, a count for preferring that indictment without probable cause is supported. The plaintiff therefore in this action succeeded in supporting the only count in his declaration, and is entitled to the general costs of the cause. The onus of proving want of probable cause was on the plaintiff, and as to nine of the assignments of perjury he failed in the proof of it, but the charge is single and entire, that of preferring maliciously and without

(a) Before Lord *Denman* C. J., *Lit- tledale, Patteson and Coleridge* Js. (b) 4 Taunt. 616.



1841.  
  
 DELISSER  
 v.  
 TOWNE.

probable cause an indictment for perjury. As was said in *Reed v. Taylor* (a), if there is no probable cause for some of the charges in the indictment, the indictment is preferred without probable cause. It is not like the case of a divisible issue, as where in libel several libellous expressions are imputed to the defendant, who as to part disproves that they were applied to the plaintiff, or that they had the meaning attributed to them by the innuendoes; still less resemblance does this case bear to one in which distinct issues are raised on the record.

*Kelly*, in support of the rule. The question of damage sustained by the plaintiff is as much dependent upon the proof, or failure of proof, of the whole declaration, as in an action of libel, where the defendant has been held entitled to the costs of witnesses called by him on a part of the charge of libel in the declaration which was found for the defendant; *Prudhomme v. Frazer* (b). So in *Doe v. Errington* (c) it was held that, when upon one demise in one count in ejectment several messuages were sought to be recovered, the defendant, succeeding as to a part, was entitled to his costs as to such part. [*Patteson J.* In *Anderson v. Chapman* (d) the defendant was charged with negligence in carrying casks of tallow; the jury found for the defendant except as to one cask, and it was held that the defendant was not entitled to costs as to the other casks.] That case, at all events, shews that the plaintiff is not entitled to the costs of the witnesses whose evidence applied to the nine assignments. It is quite irreconcilable with *Prudhomme v. Frazer*. [*Patteson J.* I do not think so.] *Prudhomme v. Frazer* shews that, if the charge in the declaration be of a several nature, the including of the whole in one count will not deprive the defendant of his right to costs upon

(a) 4 Taunt. 616.


(c) 4 Dowl. P. C. 602.

(b) 2 A. & E. 645; S. C. 4 N.

(d) 5 M. & W. 483.

& M. 512.


any part on which he succeeds. Here the plaintiff might have made each assignment of perjury the subject of a distinct count in his declaration. (He also cited *Gougenheim v. Lane* (a).)

1841.  
  
 DELISSER  
 v.  
 TOWNE.

*Cur. adv. vult.*

LORD DENMAN C. J. delivered the judgment of the Court.—This case was compromised by the advice of the Court, the defendant waiving whatever right he might have to make absolute his rule nisi for a new trial, and plaintiff consenting to reduce his damages from 800*l.* to 250*l.*; the state of things was thus exactly the same as if on the trial a verdict had been entered for the latter sum; and the costs, no specific provision having been made for them, must be calculated on that supposition. The master's taxation has been complained of, principally because he allowed the plaintiff the costs of witnesses who were not called at the trial, but were brought to answer a case, which it was supposed the defendant would attempt to make as to nine out of ten assignments of perjury contained in the indictment, for the malicious prosecution of which this action was brought. The plaintiff failed in establishing want of probable cause as to those nine assignments, and succeeded only as to the tenth; the defendant was not called upon for any answer as to the nine. Under these circumstances we think the master was wrong in allowing the costs of these witnesses. But the defendant further contends, that the master ought to have allowed him the costs in respect of those nine assignments, upon the ground that the plea of not guilty raised a distinct issue upon each of these assignments of perjury. Upon consideration, and looking at the declaration in this case, we are of opinion that the plaintiff's cause of action was one and entire, namely, the defendant's having, without probable cause, preferred an

(a) 4 Dowl. P. C. 482.

1841.  
  
 DELISSER  
 v.  
 TOWNE.

indictment against the plaintiff for perjury, alleged to have been committed upon one trial. Though the indictment contained assignments of perjury upon several parts of the plaintiff's examination upon that occasion, yet it was but one charge, and the preferring that charge without probable cause constitutes but one cause of action. The plea of not guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is one entire issue; and, if there was no probable cause for any part of the charge, the plaintiff was entitled to a verdict. Whether there was or was not probable cause for other parts of the charge would affect the damages, but could not affect the verdict, or shew that the defendant had properly preferred the indictment, that is, with probable cause for every part of it. This leaves untouched the decisions in *Prudhomme v. Frazer*(a) and *Doe d. Errington v. Errington*(b), which we think no less correct than beneficial; and it follows the principle on which the Court of Exchequer disposed of *Anderson v. Chapman*(c).

Another objection was, that the master had allowed the plaintiff the costs of defendant's application for a new trial. We think it unfounded, because the consent that the verdict should stand against him, bound him to pay the costs of the cause, under which description the costs of the rule undoubtedly fall. *M'Andrew v. Adams*(d) has no application whatever.

Rule absolute to review taxation, and disallow plaintiff's witnesses as above, but not to allow defendant's costs.

(a) 2 A. & E. 645; S. C. 4 N. & M. 512.

(c) 5 M. & W. 483.  
 Dow l. P. C. 120.

(b) 4 Dowl. P. C. 602.

G.



1841.

BIRMINGHAM, BRISTOL and THAMES JUNCTION  
RAILWAY v. WHITE.

Monday,  
February 1st.

**RULE** to shew cause why the defendant should not be at liberty to inspect and take extracts from the minute books of the Company, and particularly those relating to the meetings at which certain calls were made, the amount of which by this action it was sought to recover from the defendant.

The defendant's attorney made an affidavit that this was necessary to enable the defendant to plead, and he and the defendant deposed to belief that there was a good defence on the merits, and that the application was made *bonâ fide*, and solely with the professed object. The application had been heard at chambers, and referred by the judge to the Court.

Sir *J. Campbell* A. G. and *E. James*(a) shewed cause. There is no precedent for such an application as this. The defence is, that the defendant is not a proprietor; if he is, there is an end of the defence; if not, he has no right to what he now asks; *Hedges v. Atkis*(b). In that case it was held, that, if there were a right to inspect, it could not be claimed until after issue joined, so that the Court might see whether it was necessary or not. The object of the defendant in making this motion obviously is to enable him to plead pleas, which the Court in the *South-Eastern Railway Company v. Hibblewhite*(c) decided should not be allowed. The act constituting the Company has clauses shewing in what cases a shareholder

A railway act contained several clauses relating to inspection of the books. In an action for calls the defendant applied for an inspection, to enable him to plead, which inspection was not directed to be given by either of the clauses.

The Court refused to compel the Company to permit the inspection required.

(a) It was objected that the affidavit did not shew any demand before applying to the Court; but on this the Court did not decide, intimating however that it was untenable, no such point having been made at the hearing of the sum-

mons, nor any such point having been referred by the judge to the Court.

(b) 3 Wils. 398; S. C. 2 W. Bl. 877.

(c) 4 P. & D. 246.

1841.

  
 BIRMINGHAM,  
 BRISTOL  
 and  
 THAMES  
 JUNCTION  
 RAILWAY  
 v.  
 WHITE.

is entitled to inspect the books, and none of them apply to such a case as this. The general management of the Company is vested in the directors. The 108th section enacts, that it shall be competent "at any general or special meeting" to call for information and inspection of any papers. By section 119 a book of all payments and receipts is to be kept by the Company, and open at all times to the inspection of loan creditors. By section 127 the Company are to keep a true account of the places of abode of the proprietors, which shall be at all times open to the proprietors. The statute has given a general form of declaration. The purview of the whole statute shews that it was intended to create a statutable partnership, governed in the manner and by the regulations prescribed by that statute, and that to its provisions reference must be made to determine the rights of the shareholders.

*Platt contra.* The 108th section is not sufficient to give a proprietor the requisite information; he may demand it at the meeting, and be outvoted by the other members present. The special power to inspect given by the statute does not take away from the shareholders (one of whom the plaintiffs say this defendant is) the common law right of inspecting that in which they have a quasi partnership interest. It is said that the defendant here seeks for the information that he may find out some defect in the proceedings of which he may take advantage; but, if that were so, it would not bar his right; *King v. King (a)*.

Lord DENMAN C.J.—In that case the plaintiff who sought the inspection had a clear and direct property. I think it could not have been the intention of the act to give to any parties so large a power of inspection as that contended for on the part of the defendant. Sufficient powers are given to enable the shareholders to ascertain what are their rights; but the provisions of the act were not

(a) 4 Taunt. 666.

intended to assist a defendant in the discovery of some defect in the proceedings of which he might avail himself by a plea.

LITTLEDALE J. concurred.

PATTESON J.—The defendant has neglected all the opportunities which, if he is a shareholder, he had under the statute of obtaining the information he asks, and now I think we ought not to assist him in his search for a defence to the action brought against him.

COLERIDGE J. concurred.

Rule discharged.

G.

CHARLOTTE BACON v. SMITH and another, Assignees of  
BACON, a Bankrupt (a).

Tuesday,  
February 2d.

**ARREST** of judgment. Case for permissive waste. The declaration stated, that by devise of one *Furniss*, the premises wasted were given to the husband (the bankrupt) and the plaintiff, to hold the same for their joint lives, and they were afterwards devised to the survivor during his or her life. The declaration then alleged that, while the joint lives were still existing, the interest of the husband vested in the defendants, and that they entered and suffered and permitted the premises to become and be out of repair, ruinous, &c. That they retained possession until the husband died, and the right and title to the premises became vested in the plaintiff.

Devise to A. and his wife to hold for their joint lives, and to the survivor for his or her life. The husband during the joint lives assigned, and the assignee committed waste:—

Verdict for the plaintiff. This rule was obtained to shew cause why the judgment should not be arrested.

*Held*, that the wife (who survived) could not maintain case for waste, she having only a contingent remainder at the time of the waste done.

*Alexander, Wightman* and *Heaton* shewed cause. It is

(a) Decided at the sittings after this term, Tuesday, February 2.

1841.

BACON  
v.  
SMITH.

objected that it appears on this declaration that the wife had no interest in the premises wasted at the time of the waste done, but it is sufficient that she had then a contingent interest in remainder, to take effect immediately upon the death of the then tenant for life, and that at the time of the action brought, that remainder had become vested in possession in her. [Lord *Denman* C. J. If the husband had remained in possession until his death, could she have maintained an action for waste against his executors?] That case might be distinguishable, if necessary; his possession would be her possession. [Coleridge J. And would not the possession of the assignees of the husband be as much his possession?] Not against her. On the death of the husband the whole survived to the wife, and he could not by any act during his life prejudice the estate, which was to come to his wife: *Green d. Crew v. King* (a), *Co. Litt.* 326 a, *Com. Dig.* Baron and Feme, (K). That there is no precedent for such an action as this, is sufficiently accounted for, for until the 3 & 4 *Will.* 4, c. 42, s. 2, on the death of a tenant for life, his executors were not liable to an action for damage to the real estate in his lifetime.

*Cresswell* and *Baines* contra were stopped by the Court.

LORD DENMAN C. J.—The right of one tenant for life to sue another for waste does not come in question in this case. The declaration discloses that the plaintiff had no vested interest at the time of the waste committed.

LITTLEDALE J. concurred.

PATTESON J.—There is a passage in point in *Co. Litt.* 53 b, “Note, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the

(a) 2 W. Bl. 1211.

waste he granteth it over, though he taketh back the whole estate again, yet is the waste dispunishable.”

COLBRIDGE J. concurred.

G.

Rule absolute.

1841.

BACON  
v.  
SMITH.

The QUEEN v. The Inhabitants of ST. JOHN, MARGATE.

Wednesday,  
January 27th.

UPON an appeal against an order of sessions for the removal of *John Gocher* and wife, and four children, from the parish of St. John, Margate, to the parish of Playdon in Sussex, the Court of Quarter Sessions for Kent quashed the order, subject to the opinion of this Court on the following case:—

An examination of a pauper stated a settlement by apprenticeship. The notice of the grounds of appeal stated that the pauper did not acquire a settlement by apprenticeship, because the premium was paid by the parish officers, and the regulations of the statute for binding parish apprentices were not observed:—

In the examination of the pauper upon which the order was made, he stated as follows:—“ I am thirty-one years of age, and was born at Old Romney. When I was about fifteen years old I was bound apprentice to *John Clark* of Playden. I was bound until I should attain the age of twenty-one years, and I now produce the indenture dated Aug. 30th, 1821, executed by both parties and by my father; the consideration was 15*l.* I served the whole time, and resided in my master’s house at Playden during the said service. I have been relieved by Margate parish three times.”

Held, that the execution of the indenture of apprenticeship was admitted.


A copy of this examination was duly sent with the order of removal to the parish officers of Playden, who thereupon gave notice of appeal, and stated the following grounds of appeal:—

Seem, the notice of grounds of appeal was altogether bad for generality.

“ That the said *John Gocher* did not acquire a settlement in the parish of Playden by reason of his being bound apprentice by indenture dated 30th Aug. 1821, to one *John Clark* and serving under the same indenture, because the premium of 15*l.* paid to the said *John Clark* was a payment made by the parish officers of Old Romney in the said county of Kent, and not by the father of the said *John*



1841.

  
The QUEEN  
v.

Inhabitants of  
St. JOHN,  
MARGATE.

*Gocher*, and the requisitions of the statute made for the regulation and binding of parish apprentices then in force were not complied with."

Neither the indenture nor a copy of it was sent to the appellants at any time, nor had they seen it until the day of the appeal. At the hearing of the appeal the counsel for the respondents began by stating his case, and reading the examination and grounds of appeal, and he then produced an indenture of apprenticeship as the document referred to in the examination, and was about to have it read, when the counsel for the appellants inquired who produced it. The counsel for the respondents then called *John Gocher*, the pauper, who said he produced it, and had given it to the attorney for the respondents. The counsel for the respondents then proposed to read the indenture, alleging that the appellants could not dispute the signatures of the parties to the instrument, inasmuch as its execution was admitted by the terms of the grounds of appeal. The appellants, on the other hand, contended that the due execution of the indenture was put in issue by the grounds of appeal, and that, as it appeared that there was an attesting witness, that witness ought to prove the execution in the usual way. The Court decided that the execution of the indenture ought to be proved. The counsel for the respondents then withdrew the indenture, and contended that the affirmative lay upon the appellants, and called upon them to begin and prove their case. The Court decided that the appellants were not bound to begin, and they requested the respondents' counsel to proceed with his case. This the respondents did not do, whereupon the order was quashed.

The principal question for the opinion of the Court of Queen's Bench is whether the due execution of the indenture was put in issue by the grounds of appeal. If this question should be decided in the affirmative, then the order of sessions is to be confirmed, unless the Court should be of opinion that the appellants were bound to begin; in which case, or if the Court should be of opinion that the

due execution of the indenture was not put in issue, then the order of sessions is to be quashed, and the case to be reheard.

1841.

The QUEEN

v.

Inhabitants of  
ST. JOHN,  
MARGATE.

*Horn* in support of the order of sessions. The notice of grounds of appeal here in effect traverses the settlement stated in the examination, and does not confess and avoid it by setting up a settlement in a third parish. That is the distinction between the present case and that of *Rex v. Hockworthy* (a), which decided that in the latter case the settlement stated in the examination was admitted.

*Hodges* contra. The grounds of appeal set up an invalidation of the settlement in the examination for a particular defect only; and only on the existence of that defect, therefore, are the parties at issue: all the other facts are admitted. Besides, the grounds of appeal are objectionable, as stating too generally the non-compliance with the act for apprenticing paupers. In what respect the statute was not observed ought to have been stated: *Rex v. Inhabitants of Whitley Upper* (b). (He was then stopped by the Court.)

LORD DENMAN C. J.—That case seems to shew that the notice was altogether defective. However that may be, it is clear that the notice of the grounds of appeal does not put in issue the execution of the indenture. It merely disputes the legality of the payment of the 15*l.*; but that admits the formal execution of the instrument, and sets up a distinct ground, by which notwithstanding it is said the settlement was vitiated.

LITTEDALE, PATTESON and COLERIDGE Js. concurred.

G.

Order of sessions quashed.

(a) 7 A. &amp; E, 492; S.C. 2 N. &amp; P. 383.

(b) 3 P. &amp; D. 81.

1841.

Tuesday,  
January 12th.

Where one person being in possession of goods belonging to another agrees by parol to become the purchaser of them, his subsequent acts may amount to proof of an acceptance, so as to satisfy the statute of frauds.

The plaintiff was the owner of some goods lying in bond, and entered in the name of the defendant, a custom-house agent. The plaintiff being indebted to the defendant gave him a written authority to sell the goods, and pay himself out of the proceeds. The defendant not having sold them, subsequently agreed by parol to purchase them, and he then sold them, and credited the plaintiff with their value:—  
*Held*, that this was evidence of an acceptance of the goods by defendant.

## EDAN v. DUDFIELD.

**DEBT** for goods sold and delivered, and on an account stated.

Pleas: 1st, except as to 1*l.* 9*s.* 2*d.* parcel &c., *nunquam indebitatus*: 2nd, except &c., a set off for money lent &c.: 3rd, as to 1*l.* 9*s.* 2*d.* a tender, and payment into Court.

Replication: 1, issue joined on the first plea; 2, *nunquam indebitatus* to the 2nd, (upon which issue was joined); 3rd, admitting the tender, and taking the money out of Court.

At the trial before Lord *Denman* C. J., at the Westminster sittings after Hilary Term, 1839, it appeared that the plaintiff was a dealer in German toys, and the defendant a custom-house agent, who had been employed by the plaintiff for a considerable time to clear goods for him. In the month of April, 1838, there being a debt of about 50*l.* due from the plaintiff to the defendant, and there being some goods belonging to the plaintiff in bond in the defendant's name, the plaintiff called on the defendant, and directed him to sell the goods, and pay himself out of the proceeds; the defendant required a written authority to sell, and the plaintiff accordingly sent him the following memorandum:

London, April 6th, 1838.

"Sir,—We do hereby authorise you to sell by private contract the whole of the goods you have entered for us, remaining in bond, and to pay yourself, out of the proceeds, duties, and charges, due on our account, the balance you will as a matter of course hand over to us.

We are, Sir, your obedient servants,  
*A. Edan & Co.*"

Some short time afterwards, a friend of the plaintiff called on the defendant and inquired whether he had sold the goods; the defendant said he thought he had got a purchaser for them, but he had not got his answer; and immediately

afterwards he added, "very well; I'll keep the goods myself," and he agreed to take them at the invoice price, less a discount of 15 per cent.

This was communicated to the plaintiff; the defendant afterwards sold the goods, and rendered a debtor and creditor account to the plaintiff, in which credit was given to the plaintiff for the goods in question.

It was submitted on the part of the defendant, that there was no evidence of any acceptance of the goods so as to satisfy the Statute of Frauds, and a nonsuit was applied for; the Lord Chief Justice however thought there was a case to go to the jury, and, after witnesses had been called for the defence, the plaintiff had a verdict, leave being reserved to the defendant to move to set it aside, and enter a nonsuit.

*Kelly*, in Easter Term following, had obtained a rule nisi accordingly, or for a new trial, on the ground that the verdict was against evidence, and upon affidavits.

*Thomas* in last Michaelmas term (*a*) shewed cause. It was argued on the part of defendant, that there was no evidence to take the case out of the Statute of Frauds; but the jury believed the witness, who swore to the conversation in which the defendant said he would take the goods at the invoice price, less the 15 $\frac{1}{2}$  per cent. discount, and that was sufficient evidence of an acceptance. Besides, the defendant is barred by the pleadings from denying the sale of the goods; for the plea of tender admits the contract on each of the counts of the declaration. [*Coleridge J.* It has been settled that a plea of tender only admits *some* contract; it does not admit *the* contract declared upon. In *indebitatus assumpsit*, the plaintiff may give evidence of several contracts.] But here there is only one contract set up and proved, and a payment on account of that contract must admit the whole of it. [*Littledale J.* Suppose there are


1841.

EDAN

v.

DUDFIELD.

(*a*) Before Lord Denman C. J., *Littledale*, *Williams* and *Coleridge Js.*


1841.  
  
 EDAN  
 v.  
 DUDFIELD.

two contracts, upon one of which a sum of money is due, and that sum is paid into Court generally, may not the plaintiff take it out, and yet proceed on the other contract, which then would be the only one he would rely upon?] At any rate after a plea of tender, the plaintiff cannot be nonsuited; *Harding v. Spicer* (a).

*Kelly*, in support of the rule. The supposed contract of sale was in fact not a legal contract within the Statute of Frauds; for it was a parol contract, and there was no acceptance of the goods by the defendant, nor in fact could there be, as the goods were all along in his possession. [Lord *Denman* C. J. The defendant sold the goods, was not that act evidence of an acceptance?] The contract for sale was by parol, and nothing that afterwards passed by word of mouth could amount to an acceptance. [Lord *Denman* C. J. Certainly not.] Then there was no acceptance here. The statute (b) says that, "no contract for the sale of any goods &c. for the price of 10*l.* shall be allowed to be good, except the buyer shall accept part of the goods so sold, and *actually receive the same, &c.*" It cannot be said that a person already in possession of goods, "accepts and actually receives" them from another. Suppose goods were delivered to a carrier in the course of business, and it was proved that the carrier verbally agreed to purchase them, that would not be sufficient. The act of acceptance must be inconsistent with any previous tenure of the property. Here the goods were actually in possession of the defendant for the purpose of sale, he had a written authority from the plaintiff to sell them and deduct his debt, and he did sell them, and render an account to the plaintiff. [Lord *Denman* C. J. If the fact of the sale had stood alone, it might not have been inconsistent with the written order; but the evidence is, that the defendant sold, with a declaration that he sold on his own account, and the ques-

(a) 1 Camp. 327. But see note, (b) 29 Car. 2, c. 3, s. 17.  
 ibid.

tion is whether that was not evidence for the jury of an acceptance. The argument rather seems to be, that the Statute of Frauds does not go far enough, and that it ought to have provided that proof of acceptance should be in writing.] It is submitted that there was no evidence whatever of the acceptance. A literal compliance with the statute was impossible for the reasons already stated; and a mere constructive acceptance is not sufficient; *Nicholle v. Plume* (a), *Hanson v. Armitage* (b), *Phillips v. Bistolli* (c). With regard to the tender and payment into Court, he referred to *Kingham v. Robins* (d), and Coleridge J. referred to *Stapleton v. Nowell* (e).

1841.  
  
 EDAN  
 v.  
 DUDFIELD.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the following judgment:—In this case, which was an action for goods sold and delivered, defendant claimed a nonsuit, for want of compliance with the Statute of Frauds. There was no memorandum in writing, nor (as he contended) any acceptance. The facts were, that defendant had acted as agent for plaintiff on several occasions, in relation to certain merchandises imported from France, and that the goods in question were lying at the custom-house in defendant's name, to be sold by him for plaintiff. The plaintiff was considerably indebted to the defendant, who was pressing that a sale should be made, that he might pay himself out of the proceeds, and an authority to sell, dated 6th April, was given by plaintiff to defendant, and produced in the course of plaintiff's evidence. But a witness stated that, at the end of the same month, he had called on defendant on behalf of plaintiff, and that in that conversation defendant finally agreed to buy these goods himself, 15 per cent. under the cost price. The defendant subsequently sold the goods,

(a) 1 C. & P. 272.

& R. 822.

(b) 1 D. & R. 128; S. C. 5 B. & A. 557.

(d) 5 M. & W. 94.

(e) 6 M. & W. 9.

(c) 2 B. & C. 511; S. C. 3 D.

1841.

EDAN  
v.  
DUDFIELD.

and rendered a debtor and creditor account to the plaintiff, in which credit was given to the plaintiff for the goods by an item in these words, "Goods (describing them) sold for 120l." The action was brought in effect for that sum, and the verdict passed accordingly.


The plaintiff argued that this parol contract of sale was binding within the statute, because defendant had accepted the goods in selling them and keeping the money. This was denied, and it was said that the statute requiring acceptance and actual receipt of the whole or part, where there was no written memorandum, could not be satisfied in the case of one at the time of the bargain possessed of the goods, inasmuch as that circumstance prevents them from being delivered to him or actually received by him in virtue of the sale. At all events, it was contended that no act could be relied on to prove acceptance and receipt, but what was inconsistent with the purpose of the prior possession; whereas in this case, all that was done, the sale and the account rendered were perfectly consistent with the authority previously given, and the defendant's character of agent. We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties, which amount to acceptance; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion, after fully considering all the cases cited, especially *Elmore v. Stone* (a), *Nicholle v. Plume* (b), and *Maberley v. Sheppard* (c); agreeing that such evidence must be unequivocal, but thinking the question, whether it is so or not, under all the circumstances, fact for the jury, not matter of law for the Court. It was indeed contended, that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance, for that to admit it would let in all the inconvenience which the statute was intended

(a) 1 Taunt. 458.

(b) 1 C. &amp; P. 272.

(c) 10 Bing. 99.

to prevent. No case however warrants the holding the rule so strict, nor does convenience require it; for, where there is the foundation of an act done to build upon, the admission of declarations to explain that act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable. Upon this principle the statute of 9 *Geo.* 4, c. 14, s. 1, on a very analogous matter, has been construed in the Court of Exchequer; for whilst in *Willis v. Newham* (a) it was held that part payment, to take a case out of the Statute of Limitations, could not be proved by a verbal acknowledgment *only*, it was held in *Waters v. Tomkins* (b) that, where a sum had been paid without any statement on what account, declarations were admissible to explain on what account.

1841.  
  
 EDAN  
 v.  
 DUDFIELD.

Therefore a nonsuit cannot be entered. The motion for a new trial, on the ground that the verdict was against the evidence, was supported by some very strong observations on the probabilities of the case, which were not however exclusively in favour of defendant. It was moved for also, on defendant's affidavit, which we have thought it right to examine carefully with those on the other side. The answer which these give is complete: no subsequent information has been or can be obtained, and defendant's case is narrowed to the improbability that that of his adversary can be true. But this has been already considered by the jury, who were satisfied with the proof of it by a witness whose character stands unimpeached.

*A.*

Rule discharged.

(a) 3 Y. & J. 518.

(b) 2 C., M. & R. 723.





1841.

DOE *d.* JOHN LEAN *v.* T. T. LEAN, C. LEAN and  
W. LEAN.

A testatrix,  
owner in fee  
(before stat. 7  
Will. 4 and 1  
Vict. c. 26),  
devised to C.  
L. (her eldest  
son) as fol-  
lows:—"An  
estate called  
L. in the pa-  
rish of B." for  
life; "and  
after his death  
I give and be-  
queath the  
same unto his  
son T. L. free  
of legacies and  
mortgages."  
There was a  
residuary  
clause in fa-  
vour of C. L.  
who was ap-  
pointed execu-  
tor:—*Held*,  
that T. L. took  
an estate for  
life only.

**EJECTMENT.** The cause was tried at the Cornwall summer assizes, 1838, before *Coltman J.* when a verdict passed for the plaintiff, subject to the opinion of this Court upon a special case, which stated (*inter alia*) the following facts:—

*Thomas Toker*, by his last will and testament, dated 5th of June, 1784, duly attested to pass freehold estates, after various trifling legacies and bequests, devised and bequeathed all the rest, residue and remainder of his lands &c. and all other his estate, goods, chattels &c. unto his daughter *Mary*, the wife of *Christopher Lean*, her heirs &c. and appointed her the executrix of his will.

The testator, at the date of the will, and at the time of his death in 1819, was seised of a freehold farm called *Lease*. *Christopher* and *Mary Lean* entered upon this farm at the death of the testator, and *Mary*, who succeeded her husband, remained in the occupation thereof till her death.

Her last will, dated 13th August, 1819, and duly attested to pass real property, contained the following sentences:—"As to my worldly goods with which God hath blessed me, which were given me by my father, and were again given and bequeathed to me by my husband *Christopher Lean's* last will, which (a) I give and bequeath in the following manner: First, I give and bequeath unto my son *Christopher Lean* an estate called *Lease*, in the parish of *Blisland*, during his natural life, and, after his decease, I give and bequeath the same unto his son, *Thomas Lean*, free of legacies and mortgages."

Then followed bequests of 1s. each to her two sons, *John Lean* and *Thomas Lean*, and to three of her daughters, and of all her household furniture and wearing apparel to two other daughters.

Then came the following residuary clause:—"All the  
(a) Sic.

rest, residue and remainder of my goods, chattels, rights and credits, personal and testamentary estates, wheresoever and whatsoever, I hereby give and bequeath the same unto my son, *Christopher Lean*, whom I do make, constitute and appoint my whole and sole executor of this my last will and testament, he paying my just debts and legacies before given in and by this my will."

1841.  
  
 DOE  
 d.  
 LEAN  
 v.  
 LEAN.

Upon the death of the testatrix, which happened in 1823, her son, *Christopher Lean*, mentioned in her will, took possession of the estate called *Lease*, and occupied the same till his death in 1826, when *Thomas Lean*, the second son of the last-mentioned *Christopher*, as devisee of the said *Mary Lean*, took possession of the said farm called *Lease*, and occupied the same till his death in 1836. *John Lean*, the lessor of the plaintiff, was the eldest son and heir at law of the said last mentioned *Christopher*, and also the heir at law of *Mary Lean*, the testatrix. The defendants were the children of the said *Thomas Lean*, deceased.

The question for the opinion of the Court was, whether, under the will of *Mary Lean*, the said *Thomas Lean* took a fee simple, or only a life estate, in the said farm called *Lease*. If the Court should be of opinion that the said *Thomas Lean* became seised in fee simple, a verdict was to be entered for the defendants; but, if the Court should be of opinion that *Thomas Lean* took a life estate only in the said premises, the plaintiff was entitled to recover, and the verdict was to be entered for him accordingly.

The case was argued in last Michaelmas term (a).

*Erle*, for the lessor of the plaintiffs, argued that the term "estate" in the will was merely a local description of the farm "*Lease*," and therefore that *Thomas Lean*, the devisee, took only an estate for life. He cited *Doe d. Norris v. Tucker* (b), *Pettiward v. Prescott* (c), *Barry v. Edgworth* (d),

(a) Nov. 10th, before Lord Denman C. J., *Littledale, Williams and Coleridge Js.*

(b) 3 Barn. & Ad. 473.

(c) 7 Ves. 540.

(d) 1 Eq. Ca. Abr. 178.

1841.



DOE

d.

LEAN

v.

LEAN.

*Wilkinson v. Merryland (a), Chester v. Painter (b), Frogmorton d. Wright v. Wright (c), Whitelock v. Heddon (d), Fletcher v. Smiton (e), Doe d. Winder v. Lawes (f), Esdaile v. Gall (g), Doe d. Gwillim v. Gwillim (h).*

*Bompas* Serjt., for the defendants, contended that, taking the whole will together, the word "estate" must be taken to signify the testator's interest in the farm, and that the demise to *Thomas Lean* passed the fee. He relied upon *Andrew v. Southouse (i), Tuffnell v. Page (k), Holdfast d. Cowper v. Marten (l), Roe d. Child v. Wright (m), Chichester v. Oxenden (n), Uthwatt v. Bryant (o), Randall v. Tutchin (p), Doe d. Knott v. Lawton (q).*

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action of ejectment to try the effect of a clause in the will of *Mary Lean*; the lessor of the plaintiff being the heir at law of the said *Mary Lean*, and the defendants claiming under *Thomas Lean*, in the said clause mentioned. And the question is whether the said *Thomas Lean* took an estate in fee or for life only in the property: if the latter, the lessor of the plaintiff is entitled to recover; if the former, the defendants are entitled to the judgment of the Court.

The will first recites that "all her worldly goods" (without further allusion to or specification of the property in

- |   |  |
|---|--|
| (a) 1 Eq. Ca. Abr. 178; S. C. & M. 247. | (i) 5 Term Rep. 292.                                 |
| Cro. Car. 467; 1 Ro. Abr. 834.          | (k) 2 Atk. 37, 38.                                   |
| (b) 2 P. Wms. 335.                      | (l) 1 Term Rep. 411.                                 |
| (c) 3 Wils. 414; 2 W. Blk. 889.         | (m) 7 East, 259; 3 Smith, 229.                       |
| (d) 1 B. & P. 243.                      | (n) 4 Taunt. 176; S. C. affirmed in D. P. 4 Dow, 92. |
| (e) 2 Term Rep. 656; 2 Chitt. Rep. 558. | (o) 6 Taunt. 317.                                    |
| (f) 7 A. & E. 195; S. C. 2 N. & P. 195. | (p) Id. 410; 2 Marsh, 113, 119.                      |
| (g) 1 Russ. & Mylne, 540.               | (q) 4 Bing. N.C. 455; 6 Scott, 303.                  |
| (h) 5 B. & Ad. 122; S. C. 2 N.          |  |

dispute) had been given to the testatrix by her father, and again bequeathed to her by her husband's last will, and then contains the following clause, upon which the question mainly depends.

“ I give and bequeath unto my son *Christopher Lean* an estate called *Lease*, in the parish of Blisland, during his natural life, and, after his decease, I give and bequeath the same unto his son *Thomas Lean*, free of legacies and mortgages.”

That the word “estate” is in itself sufficient to pass the fee simple in a will is now placed beyond a doubt by a great variety of decisions, beginning as early as the case of *The Countess of Bridgewater v. The Duke of Bolton* (a), and succeeded by many others, quoted in the argument. It does not seem, however, to be necessary to enumerate them, when it is recollected that the Court of Common Pleas thought the case too clear for argument, the words of the demise being “ my estate of *Ashton* :” *Chichester v. Oxenden* (b). And the principle is, that the word “estate” does not merely describe the local situation of the lands devised, but also the interest of the testator therein. And a stronger case in support of the argument for the defendants cannot, perhaps, be found than that of *Doe d. Wright v. Child* (c), wherein the devise was “ of all my estate, lands &c. known and called by the name of the Coal Yard in the parish of St. Giles, London.” And it was held that the subsequent description of the property, particularizing it, did not prevent the word “estate” from having the effect attributed to it in the cases above alluded to, which shew that it is sufficient to carry the fee, unless there be some thing in the context or other parts of the will to qualify its import.

The question therefore here is, whether the word is to be understood as describing the quantity of interest of the testatrix in the property, or its local situation only,—or, at

1841.

DOE

d.

LEAN

v.

LEAN.

(a) 6 Mod. 106.

(c) 7 East, 259.

(b) 4 Taunt. 176.

1841.

DOE

d.

LEAN

v.

LEAN.

all events, whether the meaning is not left in too great uncertainty to defeat the claim of the heir at law, which cannot be done without express words, or necessary implication. In a very recent case, where a devise "of all my copyhold in the hamlet of H." was under the consideration of this Court, the language employed in giving judgment is, "the property appears to us to be described only by its tenure and local situation, and that these words of description do not include the quantity of interest in the testator;" *Doe d. Winder v. Lawes* (a).

Little can be collected from the rest of the will to shew the intention of the testatrix, except that nothing unfavourable is discovered towards her eldest son, *Christopher*, (whose eldest son and heir at law the lessor of the plaintiff is), or to abridge his power of disposition over the property; the residuary clause being to this effect—"all the rest of my goods, chattels, rights, credits, personal and testamentary estates, wheresoever and whatsoever, I hereby give and bequeath the same unto my son *Christopher Lean*, whom I do make, constitute and appoint my whole and sole executor of this my last will, in paying my just debts and legacies given in and by this my will;"—whereas the testatrix is very minute and express in cutting off four of her children with a legacy of one shilling each; and, as to two others, there is a bequest of her household furniture only. *Christopher's* power of disposition over the property would however be effectually abridged by so construing the will as to give to his second son *Thomas Lean* an absolute estate in fee simple. Nothing, therefore, further appearing elsewhere in the will (beyond what has been noticed,) to assist in the interpretation of the clause itself, we come now to inquire what is its fair meaning;—the words being—"I give and bequeath unto my son *Christopher* an (not my) estate called *Lease*, in the parish of *Blisland*, during

(a) 7 A. & E. 195; S. C. 2 N. & P. 195.

his natural life." And it seems to us that the clause is to be understood as if the expression had been, "a farm called *Lease*, in the parish of Blisland."

Then come the words on which so much reliance was placed on behalf of the defendants;—"and after his decease, I give and bequeath *the same* unto his son *Thomas Lean* free of legacies and mortgages." And the argument was, that "the same" must necessarily mean "the same estate"—and that the latter clause should be read as if it had stood simply thus:—"And after his decease I give my estate called the *Lease* to his son *Thomas Lean*,"—which it was said was clearly sufficient to carry the fee according to the authorities before referred to. It is obvious, however, that this is, in effect, an assumption of the whole question; for it assumes that the word "estate," when used before, was meant to designate the interest of the testatrix in the thing devised, and not merely to describe the thing intended so to be devised. We are of opinion, however, that the latter is, in this case, the true construction, or at least, that the intention of the testatrix is too uncertain and the use of the word "estate" too ambiguous to authorize us in holding, under the circumstances, that it passed the fee to *Thomas Lean*, against the claim of the heir at law.

Some observations were made upon the words in the clause in question,—“free of legacies and mortgages”—which taken in their natural and plain sense seem clearly to import a benefit and advantage to *Thomas Lean*, and to be directly opposed to a charge or incumbrance, which might, perhaps, have been expected, if it had been the intention of the testatrix to give to him an estate in fee simple; whereas in the residuary clause in favour of *Christopher*, in which, as has been seen, there is a devise of the property of the testatrix, including “personal and testamentary estates,” such charge and incumbrance are found.

It was argued, indeed, that, as the testatrix could not devise an estate even for life free from such mortgages as

1841.

DOE

d.

LEAN

v.

LEAN.

1841.

DOE  
d.  
LEAN  
v.  
LEAN.

might be upon it, the word "free" must be understood as meaning, "he, the devisee, making it free from (i. e. discharging) the mortgages"—but it did not appear that the estate *was* mortgaged—and this is too strained an interpretation to warrant us in acting on it to the disherison of the heir at law.

Upon the whole we are of opinion that the lessor of the plaintiff is entitled to the judgment of the Court.

A.

Judgment for plaintiff.

The QUEEN v. The Justices of the WEST RIDING of  
YORKSHIRE. Ex parte LEES.

Tuesday,  
February 2.

No appeal lies to the quarter sessions against an order of affiliation made by two justices in petty session, pursuant to the stat. 2 & 3 Vict. c. 85, s. 1.

**RULE** to shew cause why a mandamus should not issue, directed to the defendants, commanding them to enter continuances and hear an appeal by *Lees* against an order of two justices for the maintenance by him of a bastard child.

It appeared that the order had been duly made by two justices at a petty session, pursuant to the statute 2 & 3 Vict. c. 85, s. 1. The appellant had appeared before the justices, and contested his liability. He had not given any notice, under the third section of the act, that he was desirous that the case should be heard at the quarter sessions of the peace, instead of at petty sessions. He gave notice of appeal, but the quarter sessions refused to hear it, on the ground that an appeal did not lie under the circumstances.

Sir G. Lewin shewed cause (*a*).

*Erle* and *Baines* supported the rule.

*Cur. adv. vult.*


LITTLEDALE J. now delivered the judgment of the Court.

This was a rule for a mandamus to enter continuances and hear an appeal against an order of filiation. The order

(*a*) The case was argued January 21 before *Littledale*, *Patteson* and *Coleridge* Js., and 25, before

Lord Denman C.J., *Littledale*, *Patteson* and *Coleridge* Js.

had been made by two justices at a special session under stat. 2 & 3 *Vict.* c. 85 s. 1, before whom the putative father had appeared, and from whom he had neglected to remove the hearing of the application under the third section of the act. The question was, whether under these circumstances any appeal lay to the quarter sessions.

1841.  
  
 The QUEEN  
 v.  
 Justices of  
 WEST RIDING.

By the Poor Law Amendment Act, 4 & 5 *Will.* 4, c. 76, s. 72, original jurisdiction is given to the quarter sessions to hear and determine applications for orders of filiation, and the four following sections contain provisions for the regulation of their proceedings in such cases, and the limitation and enforcement of their orders. The 103d section is the general appeal clause of the act, and among other things it contains the following provision: "Or if any person shall find himself aggrieved by any order made under the provisions of this act, on such person as the putative father of any bastard child, it shall be lawful for such person or persons to appeal to any general or quarter sessions of the peace to be held in and for &c., within four calendar months next after the cause of complaint shall have arisen, or if such sessions shall be held before the expiration of one calendar month next after such cause of complaint, then such appeal shall be made to the next following sessions, either of which court of sessions is hereby empowered to hear and finally determine the matter of the said appeal, and to make such order as to them shall seem meet." It may seem extraordinary, and perhaps it was an oversight, to give an appeal from one quarter sessions to another, but the words are too plain to leave any doubt that such an appeal existed under that act; they cannot be satisfied in any other way, and must not be cut out of the act.

By stat. 2 & 3 *Vict.* c. 85, s. 1, the original jurisdiction of the quarter sessions in bastardy is transferred to the special or petty sessions: and it is enacted that, "after the passing of this act, it shall not be lawful to make any *such* application to any Court of General Quarter Sessions, nor shall any Court of General Quarter Sessions have any authority



1841.

~  
The QUEEN  
v.  
Justices of  
WEST RIDING.

to make any order upon any such application." But the third section provides, that if the putative father "shall declare to the justices in such special or petty session that he is desirous that the charge shall be heard and determined at the quarter sessions," and shall enter into the recognisances there mentioned, conditioned among other things to abide the judgment of the Court at such sessions, then "the justices in special or petty session shall not proceed further to hear the charge, but shall take such recognisance and transmit it to the clerk of the peace, and in such case all further proceedings in the matter of such charge shall be had before the said Court of Quarter Sessions *as if this act had not been made.*"

The present was not a proceeding under this section, but it is not immaterial to consider whether any appeal lies for the putative father from the decision of the quarter sessions, when the case has been brought there under it by himself, and we are of opinion that there is no appeal in such a case. An appeal must always be given directly or by clear inference from the language of the legislature; there is nothing in this act which so declares, or from which it can be inferred. The provision that the proceedings should be before the Court of Quarter Sessions "*as if this act had not been made,*" will be fully satisfied, if we understand by them those proceedings at the first Court of Quarter Sessions, to hear and determine the charge, and to enforce their order which had been in force under stat. 4 & 5 Will. 4, c. 76, ss. 72, 73, 74, 75 and 76. It is true the appeal clause in that act (s. 103) is not repealed by the later act, but that applied to orders made under the provisions of *that act*. Now the order made in a case removed by the putative father himself, is an order made under the provisions of the stat. 2 & 3 Vict. Nothing therefore in the words of either statute would compel us in the case supposed to infer any power of appeal to a subsequent quarter sessions; and certainly there is nothing in the way of policy or justice, that should lead us to expect that such power would have been given in a case in which the party has himself selected the tribunal,


to say nothing of the general inexpedience of appeals from sessions to sessions.

The question however now is, whether in a case where the party has not made the quarter sessions his court of original jurisdiction under the third section, but has been contented to abide the judgment of the special sessions under the first section, he may appeal from their judgment to that of the quarter sessions, by virtue of the 103rd section of the former act. The general argument against such appeal will be the same as we have just used, and the intention of the legislature can hardly be doubted, the purpose of the act being as stated in the preamble to give more *speedy* and effectual means for obtaining filiation orders.

But reliance is placed on the following words in the first section, "and all enactments in the said act relating to the Court of General Quarter Sessions shall be taken to apply to the said justices in special or petty session." It is said that, as the legislature by the said act had given an appeal from the quarter sessions to a subsequent quarter sessions, these words by a necessary inference imply a similar appeal from the special or petty sessions. And it is very plausibly urged, that, however unreasonable it may seem to have given an appeal from quarter sessions to quarter sessions, there is no such observation to be made as to an appeal from petty or special to quarter sessions, which is so common a provision in acts of this kind that it may be very probable that such appeal was intended to be given. If it were intended, it is to be regretted that a few words were not inserted to put the intention beyond a doubt. The words however relied on are so general that they must receive *some* limitation in construction; they must be restrained at least to bastardy applications,—and even with regard to them they cannot be construed *literally*, for, as the appeal clause itself is an enactment relating to the Court of Quarter Sessions, a literal construing of the words would give the appeal from special not to quarter but to special sessions, and so defeat the very argument which is founded

1841.

The QUEEN  
v.  
Justices of  
WEST RIDING.

1841.  
  
 The QUEEN  
 v.  
 Justices of  
 WEST RIDING.

on them. What then is the restriction which ought to be imposed upon them? We think this is to be learned from the context in the clause itself, and from the general purview of the act. From the parts of the clause which precede and follow the words it is clear that the enactments of the whole are directed to the hearing before the special sessions, to the giving them jurisdiction, declaring their powers and duties to be such as the quarter sessions had by the former act on the original hearing. And after the words in question, which will be fully satisfied by being understood with reference to such original hearing, follows this single and remarkable exception, solely applicable to such original hearing:—"that the notice to the person intended to be charged &c., need not be given more than seven days instead of fourteen before the session at which the application shall be heard;" and then follows the prohibition to the quarter sessions to make any order on such application. Every thing therefore in the clause preceding and following the words relied on applies solely to the original hearing; and we give those words their most reasonable and natural interpretation when we understand them to apply to the same subject-matter.

We have already intimated our opinion that the same interpretation accords best with the general intention of the statute; and upon these grounds we think the decision of the quarter sessions was right, and that this rule must be discharged with costs.

G.

Rule discharged with costs.

Monday,  
 January 18th.

LYNCH, an infant, &c. v. NURDIN.

Defendant  
 left his horse  
 and cart unat-  
 tended, for

half an hour, in a public street. During his absence, the plaintiff, a child between six and seven years old, got upon the cart. While the plaintiff was there, another child caused the horse to move on, and the plaintiff fell in consequence, and was hurt.

*Held*, that defendant was liable in an action on the case for negligence, although the plaintiff had partly occasioned the accident by his own trespass.

the cart. That defendant carelessly conducted himself in the management of the cart and horse, and carelessly left them in a certain public highway, without anybody to take care of the same. That the cart and horse, through the defendant's carelessness, negligence, and improper conduct in that behalf, then ran and struck against the plaintiff, then lawfully being on the said highway, and then injured the plaintiff &c.

Plea, 1, not guilty ; 2, that the plaintiff was not possessed of the cart.

Issues thereon.

At the trial before *Williams J.* at the Middlesex sittings in Easter Term, 1839, it appeared that the injury charged in the declaration, happened under the following circumstances. The defendant's horse and cart, which had been taken to Compton Street, Soho, by his carman, had been there left for about half an hour, without any one to take care of them, drawn up before one of the houses in the street, while the carman went into the house. During his absence, the plaintiff, a boy under seven years of age, and several other children, began playing about the cart, and the plaintiff got upon it. While the plaintiff was getting down again from the cart, another child set the horse in motion, in consequence of which the plaintiff fell, and his leg was broken by the wheel passing over it.

It was contended for the defendant that he was not liable, as the accident had not happened through the negligence of his servant, but through the misconduct of the plaintiff himself. The learned judge left it to the jury to say whether the defendant's servant had been guilty of negligence in leaving the horse and cart unattended for so long a space of time, and, if so, whether such negligence had occasioned the accident. Verdict for the plaintiff.

A rule nisi having been obtained for a new trial on the ground of misdirection, or that the verdict was against evidence,

1841.

LYNCH  
v.  
NURDIN.

1841.



LYNCH  
v.  
NURDIN.

*Shee* Serjt. shewed cause (a).

*Kelly* contra.

Most of the cases referred to in the judgment of the court were cited in argument, and also *Bridge v. The Grand Junction Railway Company* (b), *Daniels v. Potter* (c), *Littledale J. in Rex v. Owen* (d), *Dixon v. Bell* (e), *Luxford v. Large* (f).

LORD DENMAN C. J. in this term delivered the judgment of the Court.

This case was tried before my brother *Williams* at the sittings in Easter term, 1839. It was an action of tort for negligence by the defendant's servant, in leaving his cart and horse half an hour in the open street at the door of a house in which the servant remained during that period. The evidence for the plaintiff proved that, at the end of the first half hour, he, a child of very tender age, being between six and seven years old, was heard crying, and, on the approach of the witnesses, was found on the ground, and a wheel of the defendant's cart going over his leg, which was thereby fractured. The defendant's counsel first applied for a nonsuit. The learned judge refused the application; and no question was made before us that these facts afforded *primâ facie* evidence of the mischief having been occasioned by the negligence of the defendant's servant in leaving the cart and horse. Witnesses were then called to establish a defence by a fuller explanation of the facts that had occurred. They proved that, after the servant had been about a quarter of an hour in the house, the plaintiff and several other children came up, and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in

(a) In M. T. last, (Nov. 18), before Lord Denman C. J. *Littledale, Williams and Coleridge* Js.

(b) 3 M. & W. 244.


(c) 4 C. & P. 262.

(d) 4 C. & P. 236.

(e) 5 Mau. & S. 198.

(f) 5 C. & P. 421.

1841.

  
LYNCH  
v.  
NURDIN.

consequence of which the plaintiff fell, and his leg was broken as before mentioned. On this undisputed evidence (for there was no cross-examination of the witnesses), the defendant's counsel claimed the judge's direction in his favour, contending that, as the plaintiff had obviously contributed to the calamity, it could not be said in point of law to have been caused by the negligence of the defendant's servant. My learned brother, however, thought himself bound to lay all the facts before the jury, and take their opinion on that general point. They found a verdict for the plaintiff. It is now complained that such direction was not given; and at all events the jury are said to have given a verdict contrary to the evidence. The case came on in the new trial paper last term, and has been fully argued before us.

It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid and I do not apprehend that it can be necessary to dwell at any length. For, if I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the play-ground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded

1841.

LYNCH  
v.  
NURDIN.

party. This might possibly be assumed as clear in principle: but there is also the authority of the present Chief Justice of the Common Pleas in its support; *Illidge v. Goodwin* (a). But in the present case an additional fact appears. The plaintiff himself has done wrong: he had no right to enter the cart, and, abstaining from doing so, would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune by doing an unlawful act: and the question arises whether that fact alone must deprive the child of his remedy. The legal proposition, that one who by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed Lord *Ellenborough's* doctrine in *Butterfield v. Forrester* (b), which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress: ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation: and this would evidently be very small indeed in so young a child. But this case presents more than the want of care: we find in it the positive misconduct of the plaintiff an active instrument towards the effect. We have here express authorities for our guidance. In *Holt v. Wilkes* (c), a decision which excited great attention both in Westminster Hall and beyond it, this Court indeed held that a trespasser in a wood, where he well knew spring guns to be placed, could not sue for the injury received by him from the explosion of one of them. But Lord *Tenterden* and his three brethren cautiously and repeatedly declared that their opinion was founded on the plaintiff's knowing of the danger, and voluntarily incurring it. *Best J.*, who was supposed to carry to the greatest extent the right of protecting property against invaders by placing dangerous instruments, took infinite pains, when Chief Justice of the Common Pleas, to explain that

(a) 5 Car. &amp; P. 190.

(c) 3 B. &amp; Ald. 304.

(b) 11 East, 60.

his opinion in *Ilott v. Wilkes* (a) rested exclusively on the notice. In *Bird v. Holbrook* (b) his expressions are most remarkable. And so far is his lordship from avowing the doctrine that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott v. Wilkes* (a) an authority in favour of the action. He also expresses an inclination to agree with the two learned judges who held the action maintainable in *Deane v. Clayton* (c). There the plaintiff's dog had been killed by a spike placed on the defendant's land for the protection of his preserves, while in pursuit of a hare. *Park* and *Burrough Js.* gave judgment in favour of the plaintiff: *Gibbs C. J.* and *Dallas J.* for the defendant. The present argument does not require any particular discussion of that case, because *Bird v. Holbrook* (b) is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue. I remember being present at a trial at Warwick before Lord Chief Baron *Richards*, where the same law prevailed. The case (d) is mentioned in *Bird v. Holbrook* (b): a boy, having received serious injury from a spring-gun placed in a garden where he was trespassing, recovered a verdict for 120/. damages, which was much considered and never disturbed.

A distinction may here be taken between the wilful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between wilful mischief and gross negligence the boundary line is hard to trace—I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is then a matter strictly within the province of a jury deciding on the cir-

(a) 3 B. &amp; Ald. 304.

(b) 4 Bing. 628.

(c) 7 Taunt. 489.

(d) *Jay v. Whitfield*, cited 4 Bing. 644; 3 B. & Ald. 308.

1841.

LYNCH  
v.  
NURDIN.



1841.

LYNCH  
v.  
NURDIN.

cumstances of each case. They would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse: whether the street was at that hour likely to be clear or thronged with a noisy multitude: especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care: the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

For these reasons we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur.

Rule discharged.



1841.

The QUEEN v. JAMES BOLTON.

Tuesday,

January 12th.

**TWO** justices of the county of Middlesex made the following order, under 59 *Geo.* 3, c. 12, s. 24 :—

“ County of Middlesex.

“ To the Chief Constable &c. of the Hundred &c.

“ Whereas *W. H.* one of the overseers of Hampton Wick in the said county, did, on &c. prefer an information and complaint upon oath before me *J. M. S.* one of her majesty’s justices &c. against *James Bolton*, a poor person residing in the said hamlet of Hampton Wick, for that he the said *James Bolton*, having been permitted to occupy a parish house belonging to the said hamlet &c. situate &c., had neglected to quit the same and deliver up the possession thereof to the churchwardens and overseers of the poor of the said hamlet &c. within one month after notice and demand in writing for that purpose, signed by the major part of the churchwardens and overseers, and delivered to him the said *James Bolton* personally. And whereas upon the appearance of the said *James Bolton* this day before us, in pursuance of a summons for that purpose, we, the said justices, have proceeded to hear and determine the matter of the said complaint, and find and adjudge the same to be true : we do therefore charge and command you that you without delay go to and cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the said hamlet &c. or some or one of them, pursuant to and in compliance with the directions of an act passed &c.”

Although affidavits are admissible for the purpose of shewing that a magistrate has made an order without jurisdiction, yet, as the test of jurisdiction, with respect to the right of a magistrate to deal with any particular case, is whether he had power to *commence* the inquiry, and not whether he has in the course of it come to right conclusions, affidavits are not admissible merely to disprove the existence of any fact stated in the information, because the power of the magistrate to *commence* the inquiry depends not upon the question whether the statements contained in the information are true

A writ of certiorari having issued to remove the above or false, but upon the question whether the facts, as stated in the information, do or do not amount in law to an offence over which he has jurisdiction.

Where, therefore, magistrates made an order, under 59 *Geo.* 3, c. 12, s. 24, directing possession of a parish house to be given up to parish officers, upon an information stating that a pauper who had been permitted to occupy a parish house had refused to give it up on proper demand, the Court would not admit affidavits in contradiction of any of the statements in the information, for the purpose of shewing that the magistrates had acted without jurisdiction.

1841.

~~~~~  
 The QUEEN  
 v.  
 BOLTON.

order and all things touching the same into this Court, the notice and demand in writing to deliver up possession to the parish officers, the information, summons and order were returned, with a statement of the evidence on which the justices had adjudicated.

A rule was obtained on the part of *Bolton* to shew cause why the order should not be quashed, upon an affidavit denying that he had occupied the house as a pauper, or that he had been chargeable to the parish during his occupation of it, and adducing, in support of his case, both the evidence which had been laid before the justices on his behalf, as well as other evidence.

Sir *J. Campbell* A. G. and *Wightman* shewed cause, and contended that, as the information had given the magistrates jurisdiction, their order was conclusive as to all the facts stated therein, in like manner as if it had been set up as a defence to an action of trespass, and that it was no more competent to the defendant to disprove the fact of his having occupied as a pauper than any other fact which had been found by the justices. They cited *Basten v. Carew* (a), *Brittain v. Kinnaird* (b), *Rex v. Reason* (c), and *Rex v. Smith* (d).

*Erle* and *Petersdorff* contra contended that it was always competent to the Court to review facts for the purpose of ascertaining whether justices have acted without jurisdiction, and that in this case the defendant's affidavit would disprove the fact of his having occupied as a pauper—a fact, without which the justices could have had no jurisdiction. They cited *Rex v. Great Marlow* (e).

*Cur. adv. vult.*

(a) 3 B. & C. 649; S. C. 5 D.  
 & R. 558.  
 (b) 1 B. & B. 432

(c) 6 T. R. 375.  
 (d) 8 T. R. 588.  
 (e) 2 East, 244.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was a return by two magistrates to a certiorari for the purpose of bringing into this Court proceedings had by them under stat. 59 *Geo. 3*, c. 12, s. 24. In addition to these proceedings, the parties on each side brought before us affidavits disclosing, on the part of the magistrates, the evidence on which they acted, on the part of the defendant as well the evidence on which he relied before them as other evidence affecting the merits, not adduced before them. Two points were made in support of the order; the first, that the proceedings all being regular on the face of them, and disclosing a case within the jurisdiction of the magistrates, this Court could not look at affidavits for the purpose of impeaching their decision; the second, that, even if those affidavits were looked at, the case would be found to be one of conflicting evidence, in which there was much to support the conclusion to which the magistrates had come; and that this Court would not disturb that conclusion, even if it might have been disposed to have decided differently had the matter originally come before it.

1841.  
  
 The QUEEN  
 v.  
 BOLTON.

The first of these is a point of much importance, because of very general application; but the principle upon which it turns is very simple: the difficulty is always found in applying it. The case to be supposed is one like the present, in which the legislature has trusted the original, it may be (as here) the final, jurisdiction *on the merits* to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed; but, as the inquiry is open, *ex concessis*, to see whether the case was within the jurisdiction of the magistrates, it is contended that affidavits

1841.

  
 The QUEEN  
 v.  
 BOLTON.

are receivable for the purpose of shewing that they acted without jurisdiction; and this is, no doubt, true, taken literally: the magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses: in the one it is true: in the other, on sound principle and on the best considered authority, it will be found untrue. Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to shew to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has been presented to the magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. But, as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to shew that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable.

But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and

1841.

The QUEEN  
v.  
BOLTON.

so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge, and not to shew that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.

We will cite only two authorities in support of this reasoning. The former, that of *Brittain v. Kinnaird* (a), and the admirable judgment of *Richardson J.* at p. 442, are too well known to make it necessary to state them at length. There, in the case of a conviction under the Bum-boat Act, it was asked, shall the magistrate, by calling a seventy-four-gun ship a boat, give himself jurisdiction and preclude inquiry? The learned judge gave the answer: "Whether the vessel were a boat or not, was a fact on which the magistrate was to decide; and the fallacy lies in assuming, that the *fact*, which the magistrate has to decide, is that which constitutes his jurisdiction." And it is obvious that, if it were, whenever an action were brought against a magistrate for issuing his warrant upon his conviction, in order to shew his jurisdiction, without which he would have no defence, he would be bound to prove the facts on which his conviction proceeded. The second case is a recent decision in the Common Pleas of *Cave v. Mountain* (b), which we

(a) 1 B. &amp; B. 432.

(b) 1 Man. &amp; G. 257.

1841.

The QUEEN  
v.  
BOLTON.

cite only for the rule, which seems to us very clearly and satisfactorily laid down by the Lord Chief Justice. "There can be no doubt but that if a magistrate commit a party *charged before him, in a case where he has no jurisdiction*, he is liable to an action of trespass. But if the charge be of an offence over which, *if the offence charged be true in fact*, the magistrate has jurisdiction, *the magistrates' jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation.*" These cases were both of them actions of trespass against the magistrate convicting; but they are authorities not on that account the less in point on the present occasion.

We conclude, therefore, that the inquiry before us must be limited to this, whether the magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true: for it has not been contended that there was any irregularity on the face of their proceedings. Now the information, and the recital of it in the magistrates' return, both state that the defendant, having been permitted to occupy a parish house belonging to the hamlet, had neglected to quit the same, or deliver up possession thereof to the churchwardens &c. within one month after notice and demand in writing, signed by &c.; that he had been served with a summons to appear, and, more than seven days after, had appeared, to answer the complaint. These are all the circumstances required by the statute to found the jurisdiction: upon these it was the duty of the magistrate to proceed to inquire: and no affidavit disputes the truth of the return that such an information was laid before the magistrates, and such summons issued and served, and that such appearance took place. The return then goes on to state the substance of the evidence adduced in support of the complaint, that the defendant was heard in answer, and that the magistrates found the complaint proved. No affidavit denies that such evidence was offered, that the defendant

was heard in his defence, or that such judgment was pronounced.

Beyond this we cannot go. The affidavits, being before us, were used on the argument; and much was said of the unreasonableness of the conclusion drawn by the magistrates, and of the hardship on the defendant if we would not review it, there being no appeal to the sessions. We forbear to express any opinion on that which is not before us, the propriety of the conclusion drawn from the evidence by the magistrates: they and they alone were the competent authority to draw it; and we must not constitute ourselves into a court of appeal where the statute does not make us such, because it has constituted no other.

It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases. We may add, however, that, even if the decision were incorrect, which we do not affirm, the hardship on the defendant is much exaggerated: for it was not disputed but that the house was a parish house, and that he was liable to be turned out by an action of ejectment. The rule therefore will be discharged, and, being against magistrates, with costs.

Rule discharged.

DOUGLAS v. HOLME (a).

IN an action for money lent, and upon an account stated, tried before *Gurney* B. at the last Sussex assizes, the only evidence of an account stated, was an I. O. U. for 250*l.* in the defendant's handwriting, but not addressed to any one. It was contended on the part of the defendant, that this was not sufficient evidence, that the I. O. U. had been given by the defendant to the plaintiff, and that the plaintiff


An I. O. U. in defendant's writing, not addressed to any one, but produced by plaintiff, is *prima facie* evidence of an account stated with him.

(a) Decided in Michaelmas Term, 1840 (Nov. 7).

1841.

The QUEEN  
v.  
BOLTON.



1841.  
  
 DOUGLAS  
 v.  
 HOLME.

should be nonsuited, the learned Baron refused to nonsuit, and the jury returned a verdict for the plaintiff, damages 250*l*.

*Platt* on a former day (*a*), moved for a new trial on the ground of misdirection (*b*).

*Cur. adv. vult.*

Lord DENMAN C. J. now, stating the opinion of the Court, said they considered themselves bound by the case of *Curtis v. Rickards* (*c*), and that the mere production of the I. O. U. by the plaintiff was *primâ facie* evidence that it was given to him.

A.

Rule refused.

(*a*) November 5, before Lord Denman C. J. *Littledale, Williams, and Coleridge* Js.

ground that the verdict was against evidence, upon which a rule nisi was granted.

(*b*) He also moved upon the

(*c*) 1 Man. & Gr. 46.

ROUCH and others, Assignees of ORTON and PAXTON, Bankrupts, v. The GREAT WESTERN RAILWAY COMPANY.

Tuesday,  
 January 12th.

Departure  
 from home  
 with intent to  
 delay creditors

TROVER for tools, building materials, &c. The declaration laid the property in the bankrupts before bankruptcy,

is an act of bankruptcy, although there has been no actual delay of any creditor.

A letter therefore written by a trader during his absence from home, stating that he was absent to avoid writs that were out against him, is admissible evidence of an act of bankruptcy, without proof aliunde that any such writs were out, or that he was under any pressure from creditors.

A contract by a trader to do certain works contained a clause that if he should become bankrupt, or delay proceeding with the works, his employer should have power, after a seven days' notice to him to proceed, to employ others to do the works, that the advances made to the trader before his default should be taken as full payment, and that all tools and materials being upon the works should become the property of the employer.

The trader having delayed to proceed with the works, was served on the 11th April by his employer with notice to proceed. On the 17th April the trader committed an act of bankruptcy. On the 19th April, the notice to proceed not having been complied with, his employers took possession of the tools and materials. In June a fiat of bankruptcy issued against the trader.

In trover by his assignees against the employer for tools and materials left upon the works by the bankrupt,

*Held*, that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on the 17th April, before the notice had expired.

and stated a refusal to deliver to the bankrupts before, or to the plaintiffs after, the bankruptcy, and a conversion since the bankruptcy.

Pleas, 1, not guilty; 2, a traverse that the goods were the property of the bankrupts before the bankruptcy; 3, a traverse that the goods were the property of the plaintiffs since the bankruptcy. Issues thereon.

The cause was tried before Lord *Denman* C. J. at the London sittings after Trinity Term, 1838. The plaintiffs, who had been builders and contractors, on the 27th February, 1837, entered into a contract to do certain railway work in Wiltshire for the defendants. The contract required the bankrupts to complete the contract by a certain time, and advances were to be made to them in the course of its execution. The contract contained the following clause: "that in case the said *Orton* and *Paxton* shall become insolvents or be declared bankrupts, or shall from any cause whatsoever, other than arising from the act of the said Company, their engineer, or authorised agents, be prevented from, or delayed in, proceeding with and completing the said works according to this present contract, or shall not commence or proceed in the said works to the satisfaction of the said Company, it shall be lawful to and for the said Company, if they shall think fit, to give or cause to be given, or left with or at the usual place of abode of the said *Orton* and *Paxton*, or their sureties &c., a notice or notices in writing &c., requiring them the said *Orton* and *Paxton* to enter upon and commence and regularly proceed with the said works. And, in case the said *Orton* and *Paxton* shall, for seven days after such notice given or left, make default in commencing or regularly proceeding with the said works, it shall and may be lawful to and for the said Company to employ any other respectable workman or workmen, either by contract or by measure and value, or otherwise, to proceed with the said works and to complete the same, and pay or cause to be paid to the said workman or workmen the amount of his

1841.

ROUCH

v.

GREAT  
WESTERN  
RAILWAY  
COMPANY.

1841.



ROUCH

v.

GREAT  
WESTERN  
RAILWAY  
COMPANY.

or their charges for the same &c., out of the money which shall be then remaining due to the said *Orton* and *Paxton* on account of this contract.

“ And further, that the monies which previously to such default shall have been paid to the said *Orton* and *Paxton*, on account of any work or materials then already done or executed or provided by the said *Orton* and *Paxton* shall be considered as the full value, and be taken by the said *Orton* and *Paxton* in full payment and satisfaction, not only of and for the said work, in respect of which payment may have been made, but likewise of and for any other work and materials which the said *Orton* and *Paxton* shall have then done, executed or provided, although no such payments may have been made previously in respect thereof.

“ And further, that all the balance and monies whatsoever which then or thereafter would have been or become due and payable to the said *Orton* and *Paxton* under this contract, if this present clause had not been inserted, together with *all the tools and materials then delivered for the purpose of the works hereby contracted for*, and then being upon or about the site of the works, shall, upon such default as aforesaid, become and be in all respects considered as the absolute property of the said Company. And further, that, if the balance, monies, and materials, so to become the property of the said Company as last aforesaid, shall be insufficient to cover such charges for workmen and materials as are hereinbefore lastly directed to be paid thereout &c., then the said *Orton* and *Paxton* &c., shall and will make good and pay to the said Company such deficiency on demand.

“ And further, that all materials brought and left on the site of any works to be done under this contract by the said *Orton* and *Paxton*, or by their order, for the purpose of being permanently used in or about the said works, shall, from the time of their being so brought and left as aforesaid, be considered as the property of and belonging to the

said Company, and shall not on any account or pretence whatsoever be taken away by the said *Orton* and *Paxton*.

“ And if at any time the Company shall find it necessary to take the work entirely or in part out of the hands of the contractor, or put on additional workmen, or supply additional materials to expedite the work, or to enforce its proper execution, the Company shall have full power to take possession of the whole or such part of the machinery, materials, tools &c., used by the contractor, which the Company’s engineer may consider requisite for carrying on the work &c.”

Under this contract *Orton* and *Paxton* commenced the works in October, 1836. On the 11th of April, 1837, having previously become embarrassed, they suspended the works, in consequence of which a notice was on that day duly served upon them, under the clause above recited, requiring them to proceed, and stating that, if for seven days after the notice they should make default in proceeding, the Company would exercise their right of completing the work themselves.

The default having continued until after the expiration of the notice, the Company on the 19th April entered upon and themselves proceeded with the works.

On the 17th April, *Orton*, who was then in London, wrote to the solicitor of the defendants at Bristol, saying, “ I am now in London to avoid two writs which are out against me.”

In the June following, a fiat of bankruptcy issued against both *Orton* and *Paxton*, under which the plaintiffs were appointed assignees.

Delivery of the goods in question was demanded of the defendants in August, and was refused.

The goods consisted of tools, materials &c., which had been used by the bankrupts in the execution of their contract.

*Orton*’s letter of the 17th of April was produced by the plaintiffs as evidence of his act of bankruptcy, and was objected to by the defendants, on the ground that it was inadmissible, without proof of the fact that writs were out

1841.



ROUCH

v.

GREAT  
WESTERN  
RAILWAY  
COMPANY.

1841.

ROUCH  
v.  
GREAT  
WESTERN  
RAILWAY  
COMPANY.

against him, or that there was some pressure on the part of creditors which he sought to evade.

The plaintiffs contended that the clause, under which the defendant claimed the goods in question as forfeited, was illegal, as being contrary to the policy of the bankrupt laws.

His Lordship received the letter in evidence and a verdict was found for the plaintiffs, subject to a motion to enter a nonsuit or a verdict for the defendants.

Sir *W. W. Follett*, in the Michaelmas term following, having obtained a rule accordingly.

Sir *J. Campbell A. G.*, *R. V. Richards*, and *Helps* shewed cause (a). They argued that the clause under which the defendants claimed was illegal, but the ground upon which the Court gave judgment renders it unnecessary to notice this point further.

The argument in support of the admissibility of *Orton's* letter of the 17th April is fully stated in the judgment.

Sir *W. W. Follett* and *Talbot* contra, contended for the legality of the clause, and upon the point of evidence they cited *Fisher v. Boucher* (b), and *Hare v. Waring* (c).

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was a motion for leave to enter a nonsuit or a verdict for the defendants in an action of trover. It rested on two grounds; the first, that, in respect of the bankrupt *Orton*, the act of bankruptcy, on which it was necessary for the plaintiffs to rely, was proved only by inadmissible evidence; the second, that, by a valid

(a) At the sittings after Hilary Term, 1840, (Feb. 4), before Lord Denman C. J., *Littledale, Williams and Coleridge* Js.  
(b) 10 B. & C. 705.  
(c) 3 M. & W. 362.

contract between the bankrupts and the defendants, the property in the articles for which the action was brought had passed to the defendants.

1841.

ROUCH

v.

GREAT  
WESTERN  
RAILWAY  
COMPANY.

It was important for the plaintiffs, for a reason which will appear hereafter, to prove an act of bankruptcy committed before the 18th April; and, in respect of one of the bankrupts, this was done in part by the production of a letter written by him and bearing date the 17th. It was the reception of this letter which was objected to. (His Lordship stated the terms of the contract; the notice given by the defendants; the departure of the bankrupt Orton from his home; and his letter of the 17th April).

It was objected that there was no evidence of any pressure, nor of any writ having, in fact, been sued out against him; that the expressions therefore amounted to a mere declaration of the bankrupt, and that such had never been received against third persons. But we have no doubt that this letter was properly received. The plaintiffs were in the course of proving an act of bankruptcy by departure from the dwelling-house, or otherwise absenting himself, with intent to defeat or delay creditors. The act and the intention were both necessary to be proved; and, when the act has been proved by extrinsic evidence, it has been settled, by cases so numerous and familiar that it is unnecessary to cite them, that the intent with which the act was done may be proved by the simultaneous declarations of the bankrupt.

The principle of their admission is, that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary, and on good grounds; for the nature and strength of the connection with the act are the material things to be looked to; and, although concurrence of time cannot but be always material evidence to shew the connection, yet it is by no means essential. What, therefore, the bankrupt said immediately on his return home, as to

1841.  
  
 ROUCH  
 v.  
 GREAT  
 WESTERN  
 RAILWAY  
 COMPANY.

the place where he had been and his motive in going, was held admissible in *Bateman v. Bailey* (a); and in *Ridley v. Gyde* (b), to which we were referred by the counsel for the defendants as a leading authority, the act to which the declaration referred, and which was not a continuing act, but merely the giving a security, was done on the 25th October, and the declaration itself, which was held admissible, was made on the 20th November. There the Court seem to have adopted the rule which *Park J.* had laid down in *Rawson v. Haigh* (c), "that it is impossible to tie down to time the rule as to the declarations;" that, if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gesta*. In the case of *Ridley v. Gyde* (b) the Court thought that the conversation of November 20th was, under the circumstances, no more than a resumption of a conversation broken off on the 25th October, which immediately preceded the giving the security in question.

In the present case, however, there is no necessity to rely on these cases, because the absenting himself from home by the bankrupt was a continuing act, and the letter was written during its continuance. If his declaration, made immediately on his return, would have been admissible, that which he writes during his absence cannot, on any reasonable principle, be rejected.

But it was said that this was objectionable on another ground: the want of proof *aliundè* that, in fact, any writs had been issued against the bankrupt, or any pressure been used against him. And if, indeed, it be essential to the validity of the act of bankruptcy that there should have been either the one or the other, this objection must prevail; because the bankrupt's declarations cannot be evidence of these facts, and none other was offered. The same objection was made in *Newman v. Stretch* (d), and

(a) 5 T. R. 512.

(b) 9 Bing. 349.

(c) 2 Bing. 104.

(d) M. & M. 338.

over-ruled by *Parke J.*, who said that his impression was that it was unnecessary to give any evidence beyond the transaction itself, either that there were creditors, or that creditors had been delayed. That, indeed, was only a decision at nisi prius, and the course the cause took made it impossible to review it. But we think *Ex parte Bamford*(a) and *Robson v. Rolls*(b) fully support the ruling of the learned judge. In the former case the debtor quitted his home to avoid two men, bailiffs, whom he supposed to have a writ with them to arrest him; but in fact they had none. Lord *Eldon* said, "The circumstance that *Plowman* and *Hartley* had no writ with them, is, with reference to this point (that is the commission of an act of bankruptcy), immaterial. If, knowing that the officer *has* the writ, the debtor departs, even under a chimerical belief that he *has it with him*, but with the intention of delay, the act of bankruptcy is complete." In this case, it is true, there was a writ out against the debtor; and Lord *Eldon* mentions that circumstance, not, we think, as necessary to complete the act. A belief that the officer had the writ, that is, in substance, that there was a creditor to be delayed by flight, is essential in order to make out the intent to delay; but all that the statute requires is the act of departure, or absenting, with that intent; actual delay of any creditor is immaterial; *Robertson v. Liddell*(c); as to which Lord *Ellenborough* said, in *Chenoweth v. Hay*(d), that it had decided that the intent, and not the actual delay, was what the statute meant; and, the moment the Court have determined that, it becomes immaterial whether there was a *possibility, or not, of delay*. In *Robson v. Rolls*(b) the debtor believed there was a writ out against his person, and abstained from going out of London, as he thought, into Middlesex, to avoid being arrested; but there was no such writ issued, the creditor having proceeded only by fieri facias.

1841.  
  
 ROUCH  
 v.  
 GREAT  
 WESTERN  
 RAILWAY  
 COMPANY.

(a) 15 Ves. jun. 449.

(b) 9 Bing. 648.

(c) 9 East. 487.

(d) 1 Mau. &amp; S. 676, 679.



1841.

ROUGH  
v.  
GREAT  
WESTERN  
RAILWAY  
COMPANY.

We think, therefore, that, to constitute the act of bankruptcy, neither writ nor pressure were in fact necessary: of course the want of proof of them can be no objection. And this does not, as was alleged, reduce the evidence merely to a declaration of the bankrupt unaccompanied by any substantive act. The substantive act proved aliundè is the departure from home; that is equivocal: the declaration made during the continuance of that act shews the intention with which it was done. This objection, therefore, falls to the ground.

Next it was contended, for the defendants, that, even if a valid bankruptcy were established, the property in the articles sought to be recovered had passed to them by virtue of the clauses before cited; and a great deal of argument was urged, and many cases cited on both sides, for and against the validity in law of the agreement contained in them. But upon these we do not think it necessary to express any opinion; because we think, the bankruptcy having occurred on the 17th, before the bankrupts had committed any default within the meaning of those clauses, before, therefore, the defendants could act upon them and take possession, the operation of them was intercepted, even if they were legally valid in their first formation. The twenty-third clause affects the construction of those that follow: "if the contractors should become insolvents, or be declared bankrupts, or be prevented from, or delayed in, proceeding &c." it shall be lawful for the Company, if they shall think fit, to give a notice, requiring them to proceed; and if, *for seven days after, they shall make default in proceeding*, then the Company may employ other workmen, and proceed themselves. The right to use the materials and tools, and the vesting of the property in the defendants, are both dependent on an election to be made by them after the default made by the contractors; and that default is the neglecting to proceed for seven days after the notice given. On the sixth day no default had been made; the

defendants on that day could make no election; could not enter; the property could not vest in them: but on that day, by relation, the title of the assignees was complete. This case, therefore, falls within that of *Tripp v. Armistage* (a), with which we agree.

And it is probable that the clauses have been framed in this way, rather than in a more simple form by which the property should have been made to pass to the Company at once in case of insolvency or bankruptcy, to avoid the questions which would have arisen on its validity with respect to the insolvent and bankrupt acts. But this care has, under the circumstances, led to the difficulty on which this case will be now decided. Here was a delay in proceeding; notice was given accordingly; and, before the term limited had expired, and the forfeiture, if we may so call it, had accrued, the goods had ceased to be the bankrupts' by the title of the assignees having intervened: the subject-matter of forfeiture was therefore removed.

Our judgment then will be for the plaintiff, and the rule will be discharged, subject to an allowance for such articles, if any, as the defendants purchased and brought to the work after the bankruptcy.

Rule discharged, and the amount of  
damages referred by consent.

(a) 4 M. & W. 687.

1841.  
  
 ROUGH.  
 v.  
 GREAT  
 WESTERN  
 RAILWAY  
 COMPANY



1841.

## HEARNE, Clerk, v. STOWELL, Clerk.

In case for libel, the declaration stated that the plaintiff was a Roman Catholic priest and clergyman to a chapel at M., and that defendant intending to injure him in his office of priest and clergyman to the chapel, falsely and maliciously published concerning the plaintiff in his said offices of clergyman and priest, the alleged libel. The libel was contained in a document, which the defendant read at a public meeting, convened to petition parliament against the usual grant

**CASE** for libel. The first count of the declaration stated that before and at the time &c., the plaintiff was a clergyman and priest of the Roman Catholic religion, and held the office of senior clergyman of St. Patrick's Chapel, Manchester, being a chapel duly certified and recorded for the celebration of the services of the Roman Catholic religion, and had used and exercised his said office and calling of clergyman and priest of the said religion, and his said office of senior clergyman of the said chapel, with propriety and religious decorum &c. &c.

Yet the defendant well knowing &c., and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to deprive him of the respect and attention which he had obtained, and to injure, oppress and aggrieve him in his said offices and calling of clergyman and priest of the said Roman Catholic religion, and clergyman of the chapel aforesaid, and to hinder him in the discharge of his duties in his said offices, and to vex, harass and oppress him as such clergyman and priest of his said religion, and as such clergyman of the said chapel, heretofore, to wit on &c., wilfully, falsely and maliciously did publish of and concerning the plaintiff, and of and concerning the plaintiff in his said offices of clergyman and priest of the

to the Roman Catholic college at Maynooth. The defendant introduced the reading of the document by saying, that he would "give a specimen of what the Catholic priests, indoctrinated at Maynooth, teach the poor Roman Catholics attending them in reference to the way of salvation, how they grind them down and debase them almost as low as the beast that perisheth." He then read the document, which purported to have been furnished by a policeman, and to give an account of a man whom the policeman had seen at M. crawling on his hands and knees in a public street, and that the man had said that he was performing penance, and that the plaintiff, his priest, would not administer the sacrament to him until he had performed such penance.


Judgment arrested, because, even assuming that the libel charged that the plaintiff *had* refused the sacrament under the circumstances stated, and that it did not merely describe the penitent's *apprehension* of the plaintiff's displeasure, still the declaration did not inform the Court of the duties of a Roman Catholic priest in imposing penance, and therefore failed in shewing how the plaintiff's character would suffer from the imputation.

*Held*, that if the publication had been libellous, it would not have been privileged by the occasion.

said religion and of the said chapel, in the presence and hearing of divers good and worthy subjects of this realm, a certain false, scandalous, malicious and defamatory libel, in a certain paper or document which the defendant then declared and stated he then held in his hands, and then stated and declared was subscribed by three of the policemen of Manchester, one of whom the defendant then stated and declared was not a policeman at that moment, but that he was so at the time that he (meaning the said policeman) furnished the said document or paper, containing, amongst other things, the false, scandalous and malicious words following, of and concerning the plaintiff as such clergyman and priest of the said religion, and of and concerning the plaintiff as such clergyman of the said chapel, which said words he, the defendant, then in the presence and hearing of the said good and worthy subjects of this realm, read aloud from the said document or paper of and concerning the said plaintiff, as such clergyman and priest aforesaid of the said religion and of the said chapel, that is to say.

The declaration then set out the alleged libel as follows (such innuendoes as are not necessary to make it intelligible are omitted): A dyer going to his work asked me (thereby meaning a certain police officer, to wit, one of the said policemen), if I had seen a man walking on his hands and knees the last two nights. I said that I had not, but that I had seen him doing it the last two mornings, and that I at first thought he was making his escape or concealing himself from some pursuers, but that I subsequently took him for a cripple. In about ten minutes after this, the dupe (thereby meaning the said man) made his appearance crawling with his hands and knees on the roughest part of the pavement, (meaning the pavement of a certain public highway). I then resolved to satisfy myself, when I elicited the following answers from him. I asked him, "what are you doing all that about?" "It is penance for my sins." "Could you not atone for your sins without

1841.

  
HEARNE  
v.  
STOWELL.

1844.

**HEARNE**  
v.  
**STOWELL.**

doing that?" "No." "Why?" "Because the priest (thereby meaning the defendant) will not administer the sacrament to me until I have done it?" "How long have you done it?" "Four days." "How many days more will it take before you finish?" "I cannot tell." "But when will you go to your priest (thereby meaning the plaintiff) to know?" "When I have done it nine days more I shall go." "How many hours do you do it each day?" "Four hours." "At one time?" "No, two in the morning and two at night." "Do you work at any thing?" "I work in a factory." "Who is your priest?" "Mr. Hearne" (thereby meaning the plaintiff). "What chapel do you go to?" "St. Patrick's" (thereby meaning the aforesaid chapel). "What is your name?" "John O'Hare." "You had better come on the path, or go into that field, where it would be softer, and easy for you?" "Oh, no! that would not be doing penance." We (thereby meaning the said officer, and a certain other police officer, two of the said three policemen aforesaid) now looked at his knees, which were much lacerated; we expostulated with him, but it was of no avail, he said he was a very great sinner. We insisted on his desisting, but he resisted violently, took the serjeant's stick from him, and laid on us with it furiously. It was with great difficulty that we succeeded in subduing him, when I deprived him of his beads, his crucifix and the Garden of the Soul, which are now at the police station.

By means of committing of which said several grievances by the defendant as aforesaid, the plaintiff has been and is greatly injured in his said good name, fame and credit, and in his said office of such clergyman and priest as aforesaid, and such clergyman of the chapel aforesaid, and in the respect and attention formerly paid to him as aforesaid.

The second count, after the introductory matter stated in the first count, charged the defendant with speaking the following words (of &c., as in the first count): "I (thereby meaning the defendant) will just give you a specimen of what these priests (thereby meaning the priests of the Ro-

1841.

  
 HEARNE  
 v.  
 STOWELL.

man Catholic religion) indoctrinated at Maynooth (thereby meaning the Roman Catholic college of Maynooth, at which college he the plaintiff was educated), teach these poor creatures (thereby meaning the Roman Catholics attending the said priests) in reference to the way of salvation, how they (thereby meaning the said priests) grind them (thereby meaning the said Roman Catholics) down and debase them as low as the beast that perisheth. The circumstance which I am going to relate did not occur in Ireland, in the darkness of popery there, but here, in Manchester, in the midst of all our daylight. You will perhaps not believe it, but the witnesses are prepared to come forward and prove the fact, or I would not give it to you. I will not mention their names, lest it should expose them to persecution, but, if the papists choose to come forward and demand the evidence, that evidence is forthcoming. I bear in my hand then a document subscribed by three of the policemen of Manchester; one is not a policeman at the present moment, but he was at the time that he furnished this document. He states (meaning thereby that he the defendant was reading from or referring to the said document for a statement to that effect) that he was a policeman then, his beat was in Smedley Lane, and that one morning, a fortnight from that period, a dyer, going to his work, &c."

The count then proceeded as the first count (except that some remarks by the defendant were interspersed, which are not material), down to the words "it is penance for my sins," (*ante*, p. 697, last line,) and then introduced the following remarks by the defendant: "I am more disposed to weep than to laugh, my dear friends, for, allow me to say, I lament that a man should think that he is saving his soul and suffering the work of the Lamb of God, by thus degrading himself under the ban of a popish priest; I say, I deeply lament it."

After the words "I work in a factory," (*ante*, p. 698, line 11,) the second count introduced the following remarks by the defendant: "Poor fellow, working in a factory for

1841.

HEARNE

v.

STOWELL.


twelve hours a day, and then dragging on his hands and knees over the rough stones for four hours a day more. The priest should have taken his place and done it for him."

After the words in the first count, "when I deprived him of his beads, &c. which are now at the police station" (*ante*, p. 698, line 25), the second count added, with reference to the document, from which it was alleged that the defendant read: "The undersigned two constables are ready to give evidence of this. Now, my friends, is that an education (thereby meaning the education at the aforesaid Roman Catholic college, at which he the plaintiff was educated) which a Protestant British government is authorised in supporting for a free-born people like the English people? Are we warranted in paying our money to educate priests thus to grind down into the dust their fellow subjects? (meaning thereby that the plaintiff, then being a clergyman and priest as aforesaid, had ground down into the dust the said man, one of his fellow subjects.) Did you ever hear of a Protestant minister thus lording it over God's heritage, and debasing and degrading his flock?"

Plea: not guilty. Issue thereon.

At the trial before *Rolfe* B., at the last summer assises for Liverpool, it appeared in evidence that the defendant, who was a clergyman of the Church of England, whilst chairman of a public meeting, held at Manchester, for the purpose of petitioning parliament against the continuance of the grant to Maynooth College, had there published the alleged libel. The plaintiff called also several Roman Catholic clergymen as witnesses, to prove that, if a clergyman imposed such a penance as that in question, he might be suspended by his bishop. The penitent was afterwards taken to a lunatic asylum, where he died. The defendant did not call any witnesses, but on his behalf it was insisted that his object in reading the paper was *bonâ fide* to expose the Church of Rome, and not the plaintiff individually, and that the circumstances were such as removed any inference of malice in the publication. The learned judge stated to

the jury that the occasion did not negative malice, and directed the jury, if they thought the matter of the publication to be libellous, to find a verdict for the plaintiff. Verdict for the plaintiff.

1841.  
  
 HEARNE  
 v.  
 STOWELL.

*Cresswell* (a) moved for a new trial on the ground of misdirection, and also in arrest of judgment. In an action for defamation, malice is an essential ingredient: *Bull. N. P. 8*. In *Smith v. Richardson* (b), fifth point, it was agreed that "malice is the gist of this action, and that therefore evidence proving the manner and occasion of speaking the words, to shew that they were not spoken with malice, has always been admitted." The evidence of malice contained in the paper read by the defendant was only *prima facie*, and was rebutted by the circumstances of the case; and the plaintiff therefore should have proved actual malice: *Greenwood v. Prist* (c), where it was held, that a charge of perjury, made by a clergyman by way of illustration in the course of a sermon he was preaching, was not libellous. It should have been left to the consideration of the jury, whether the circumstances stated did not rebut the inference of malice. In *Rex v. Creevey* (d) it was left to the jury to say, whether the occasion justified the publication, and that case is recognised in *Rex v. Harvey* (e). [*Little-dale J.* referred to *Martin v. Strong* (f).] The expressions complained of applied to the Roman Catholics in general, and not to the plaintiff in particular, as in *Godson v. Home* (g).

Secondly, it was the duty of the learned judge to have told the jury that the declaration did not charge any thing really libellous.

(a) Nov. 5, 1840, before Lord Denman C. J., *Little-dale, Williams and Coleridge Js.*

(b) Willes, 20.

(c) Cited in *Brook v. Montagu*, Cro. Jac. 91.

(d) 1 Mau. & S. 273.

(e) 2 B. & C. 257; S. C. 3 D. & R. 464.

(f) 5 A. & E. 535; S. C. 1 N. & P. 29.

(g) 1 B. & B. 7; S. C. 3 Moo. 223.



1841

HEARNES  
v.  
STOWELL

Rule granted to shew cause, why the judgment should not be arrested, and also for a new trial, on the question whether the jury should have been told there was no libel. On the other point,

*Cur. adv. vult.*

Lord DENMAN C.J. on a subsequent day of the same term (Nov. 16), stated that the Court was of opinion that the learned judge was right in saying that the publication was not justified by the occasion; and added, that *Greenwood v. Priest* (a) was not law, and that all the other cases seemed consistent with the doctrine, that a publication can only be privileged by the right to discuss the particular matter in respect of which the alleged libel is published.

A Rule on this point refused (b).

Sir W. W. Follett, S. G., Hoggins and Murphy shewed cause (c) against the rule granted. The jury, within whose exclusive province it was to decide the question, have decided that the publication was libellous; judgment therefore cannot be arrested. Indeed it is difficult to understand how judgment ever can be arrested in an action for written slander. Any thing written which has a tendency to lower a man's estimation in society is libellous; 1 Stark on Slander, 169 (d). The jury must have found the publication in question had that tendency. "A publication," says Parke B. in *Parmiter v. Coupland* (e), "without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel." Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment and pronounce their opinion as a question

(a) Cited in *Brook v. Montagu*, Cro. Jac. 91.


(b) See *Tuson v. Evans*, ante, 396.

(c) Nov. 22, 1841, before Lord

Denman C.J., Littledale, Coleridge and Wightman Js.

(d) 2d ed.

(e) 6 M. & W. 108.

1847  
  
 HEARNES  
 v.  
 STOWELL.

of fact. "The judge, as a matter of advice to them, in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's libel bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases." So also *Littledale J.*, in *Baylis v. Lawrence* (a), observes, "In speaking of Fox's Act, 'Although that act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect.'" [Lord Denman C. J. "In one report (b) of *Baylis v. Lawrence* (a), I am represented as having said the contrary of what I meant to say."] After verdict, every thing which is necessary to point the libel injuriously, must be taken to have been proved. Note (1) to *Stennel v. Hogg* (c), *Gardiner v. Williams* (d). In *Ayre v. Craven* (e), which was a case of slander, imputing adultery to a physician, judgment was arrested because the declaration did not shew in what manner the adultery was connected with the plaintiff's professional conduct. But, if the slander had been written, the declaration would have been good. Here the libel imputes to the plaintiff that which would undoubtedly be injurious to him professionally, viz. that he refused to administer the sacrament except upon degrading conditions, and in point of fact it was proved that the plaintiff, if he had been guilty of the conduct imputed, would have been liable to ecclesiastical censure. Even on demurrer, all that could be objected to the declaration would be, that it does not state it to be contrary to the practice of the Catholic

(a) 11 A. & E. 920; S. C. 3 P. but that (in the words of Lord Ten-  
 & D. 526. 10 B. & C. 475), the question of

(b) Probably the report in 3 P. 10 B. & C. 475), the question of  
 & D. 528, where, in the report of intention must not be left inde-  
 his lordship's judgment, the follow- pendent of, and distinct from, the  
 ing words occur, "the question of tendency of the publication."

intention in a case of libel never  
 can be one for a jury." The mean-  
 ing of the report probably is not  
 that intention is not for the jury,

(c) 1 Wms. Saund. 227.

(d) 2 C., M. & R. 78.

(e) 2 A. & E. 2; S. C. 4 N. &  
 M. 220.

1841.  
  
 HEARNE  
 v.  
 STOWELL.

Church to refuse the sacrament under the circumstances stated. Yet in *Digby v. Thompson* (a), a declaration for libel, without explanatory averments, was held good on demurrer, on the general ground that the matter charged against the plaintiff imputed something disgraceful to him. The tendency of the publication must be left to the jury, and the Court cannot say that it has not the tendency which the jury have found that it has. They referred to *Clegg v. Laffer* (b), *Fisher v. Clement* (c).

With regard to the rule for a new trial, *Baylis v. Lawrence* (d), already cited, shews that the judge was not bound to give the jury his opinion of the publication.

*Cresswell* and *W. H. Watson* contra. Notwithstanding the verdict for the plaintiff, the Court will not presume any thing to have been proved which was not in issue: *Sweetapple v. Jesse* (e). The declaration contains no colloquium concerning the penances imposed by the plaintiff; there is no allegation that the defendant intended to impute misconduct to the plaintiff in the discharge of his duty, or that the plaintiff had really imposed this penance, respecting which the story is told. It is consistent with the declaration that the penance was performed voluntarily to propitiate the plaintiff, for it is not said, directly or indirectly, to have been enjoined by the plaintiff; nor is it even stated that the plaintiff had ever had any communication with the man who performed the penance. Even if the penance had been enjoined by the plaintiff, it does not appear that this would have been any violation of his duty as a Catholic priest, and the Court cannot take judicial notice of a Catholic priest's duty. The libel neither of itself imports any thing derogatory to the plaintiff's professional character, nor is there any

(a) 4 B. & Ad. 821; S. C. 1 N. & M. 485.

(b) 10 Bing. 250.

(c) 10 B. & C. 472; S. C. 5 M. & R. 730.

(d) 11 A. & E. 920; S. C. 3 P. & D. 526.

(e) 5 B. & Ad. 27; S. C. 2 N.

& M. 36.

apt colloquium or innuendo to give a sting to it. It is not enough that the libel may bring the plaintiff into contempt with some people, for different sects hold each other in contempt, and unbelievers hold believers in contempt. It is said that there can be no arrest of judgment in cases of written slander, but *Goldstein v. Foss* (a) was a case of written slander, and judgment was arrested, because the words of the libel, unexplained by introductory matter, were not actionable. They referred also to *Forbes v. King* (b).

The defendant is also entitled to a new trial on the ground that the judge should have said that the declaration contained no libel.


*Cur. adv. vult.*

LORD DENMAN C. J., at the sittings after Michaelmas term, 1841 (Nov. 27), delivered the judgment of the Court as follows:—Two motions have been founded on the same defect in the record, that the declaration states no libel; the first for a new trial, on the ground that the learned baron ought to have directed a verdict for the defendant, on the plea of not guilty; the second for arresting the judgment.

There was some doubt whether, according to the fair meaning of the libel, the plaintiff is thereby charged with doing any thing, or whether more was stated than the penitent's apprehension of the displeasure of his priest. This we need not discuss, for an independent objection appears, which we think must prevail. We are not informed by the declaration, and of course can take no judicial notice of the manner in which the plaintiff's character could suffer from the imputation, being ignorant of the conduct which a Roman Catholic priest ought to pursue in imposing penance.

It was contended that this defect was cured by the evidence, produced on the trial, that the conduct imputed to

(a) 6 B. & C. 184; S. C. 9 D. & R. 197. (b) 1 Dowl. P.C. 673.

1841.  
  
 HEARNE  
 v.  
 STOWELL.

1841.  
  
 HEARNE  
 v.  
 STOWELL.

the plaintiff would be considered by his superiors to be highly indiscreet and improper, would expose him to their censure and even endanger his station in the church; but to this it was properly answered, that no evidence can cure such a defect as this apparent on the record, and indeed that none was properly admissible on that subject, as the issue joined had no relation to it.

But the learned counsel for the plaintiff further stated that there was after verdict any defect on the record, alleging that, as any words may be used in a defamatory sense, and these are alleged to be injurious to the plaintiff's character, and the jury have found them to be so, we must now assume that they were so. A distinction was taken between libel and slander, all questions respecting the former being supposed to be expressly referred to the jury by the Libel Act (a). From this consideration was deduced an argument that the Court has no power to arrest the judgment in actions for libel, because they are wholly removed by the Act from the cognisance of the Court, and exclusively submitted as matters of fact to the jury.

From these propositions we must express our dissent. It is not enough to entitle a plaintiff to judgment, that he should charge malicious motives and a calumnious tendency; he must also shew that there is a libel. The words composing it may naturally convey such a meaning, and even the most innocent may possibly deserve that name, because they may in themselves have been used and understood with that intent and in that sense. But, in such case, the facts and circumstances that give a sting to a publication, apparently innoxious, ought to be brought to our notice, for we could not possibly direct judgment, either in an indictment or an action against a libeller, without seeing that a libel has been published by him. The consequence of a contrary doctrine would be inevitably this, that any words whatever, whether sensible or otherwise, whether conveying any kind

of imputation or not, and stripped of all explanation, would support a charge of libel, if only accompanied with general complaints of the intent to injure character.

Several cases are opposed to this notion. We need refer to no other than the well-considered case of *Goldstein v. Foss*(a), as fully sustaining the defendant's argument on both points. The judgment was arrested there for a similar defect.

We were desirous of considering whether the defendant was entitled to a new trial, because the learned judge ought to have told the jury to acquit on the plea of not guilty.

If the learned judge had been pointedly required to do this, he might have declared his opinion on the question of law now discussed, or he might have reserved the point for the Court. If he had told the jury that the paper proved was a libel, when the Court was of opinion that it was not, we should have been bound to set aside a verdict so obtained for misdirection. But the defendant on the trial took a different course, and sought an acquittal from the occasion of reading this libel, the bona fides of his strictures on the Catholic priesthood, and indeed from insinuating that they were founded in fact. Nor did the learned counsel object to the reception of evidence, which, it is now truly observed, applied to no fact put in issue. We do not think it open to him to move now for a new trial on this objection.

**Rule absolute for arresting the judgment.**

**Rule for new trial discharged.**

(a) 6 B. & C. 154; S. C. 9 D. & R. 197.

1841.



Tuesday,  
January 12th.

The 24 Geo. 2, c. 40, s. 12, which enacts that no action shall be maintained for any sum or debt on account of any spirituous liquors, "unless such debt shall have really been and bonâ fide contracted at one time, to the amount of 20s. or upwards," applies not only to liquors sold for the personal consumption of the purchaser, but to liquors sold to a publican to sell again.

A plea, to a declaration for goods sold and delivered, stated that the sum was claimed for spirituous liquors supplied by plaintiff to defendant, and that no part of the sum or demand was bonâ fide contracted by defendant at any one time to the amount of 20s. or upwards.

On demurrer to the replication it was objected that, consistently with the plea, the sale in each case might have been of a quantity exceeding in value 20s., but reduced by prompt payment to a sum below it.

Held, that the plea sufficiently imported that the amount in value of each sale was less than 20s.

HUGHES v. DONE.

**DEBT.** The first count in the declaration was for 4l. 2s. goods sold and delivered.

Plea: that the said sum was claimed by the plaintiff for and in respect of certain spirituous liquors supplied by plaintiff to defendant, and not a debt or demand for or in respect of any other or different matter, and that no part of the said sum or demand was bonâ fide contracted at any one time to the amount of 20s. or upwards.

Replication: that, at the several times when the said liquors were supplied by the plaintiff to the defendant, the defendant carried on the business of a publican, and the plaintiff that of a spirit merchant. That the said liquors were so supplied, as in the plea alleged, by the plaintiff in the way of his business as such spirit merchant, to the defendant in the way of his business as such publican, and were bought by the defendant, and sold by the plaintiff to the defendant, for the purpose of being consumed by the defendant's customers in the way of his business as such publican, and not for defendant's own personal use and consumption.

Special demurrer (the causes assigned in which are immaterial) and joinder.

*Petersdorff* in support of the demurrer. The plea is good, and is not avoided by the replication. The enactment in the 12th section of stat. 24 Geo. 2, c. 40 (a), is quite

(a) Sect. 1 commences "Whereas the immoderate drinking of distilled spirituous liquors by persons of the meanest and lowest sort hath of late years increased to the great detriment of the health



general, that no person shall be entitled to maintain an action for any debt on account of spirituous liquors, unless "such debt shall have really been and bonâ fide contracted at one time, to the amount of 20s. or upwards;" and there is no ground for restricting the enactment, as suggested in the replication, to liquors sold for the personal consumption of the purchaser. *Gilpin v. Rendle* (a) and *Burnyeat v. Hutchinson* (b) are authorities for applying the statute, without qualification, to all sales of liquors, and the nisi prius decisions of *Jackson v. Attrill* (c), and

1841.

  
HUGHES  
v.  
DONE.

and morals of the common people, and the same hath in great measure been owing to the number of persons who have obtained licences to retail the same, under pretence of being distillers, and of those who have presumed to retail the same without licence, &c."

Sect. 12 enacts, "That from and after the said 1st day of July, 1751, no person or persons whatsoever shall be entitled unto or maintain any cause, action or suit for, or recover either in law or equity, any sum or sums of money, debt or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and bonâ fide contracted at one time, to the amount of 20s. or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of 20s. at the least, and that without fraud or covin; and where no part of the liquors so sold or delivered shall have been returned or agreed

to be returned directly or indirectly; and in case any retailer of spirituous liquors, with or without a licence, shall take or receive any pawn or pledge from any person or persons whatsoever, by way of security for the payment of any sum or sums of money owing by such person or persons for such spirituous liquors or strong waters, every such person or persons offending herein shall forfeit and lose the sum of 40s. for each and every pawn or pledge so taken in or received by him or them, to be levied and recovered by warrant under the hand and seal of one justice of the peace where the offence is committed; and that one moiety thereof shall be to the use of the poor of the parish where such offence is committed, and the other moiety to the informer or informers; and the person or persons to whom any such pawn or pledge doth or shall belong shall have the same remedy for recovering such pawn, or the value thereof, as if it had never been pledged."

(a) 1 Selw. N. P. 55 (10th ed.).

(b) 5 B. & Ald. 241.

(c) 1 Peake, N. P. C. 180.



1841.

ИЦАНЕМ  
v.  
ДОНЕ

*Proctor v. Nicholson* (a), (the latter of which however is not in point,) cannot be supported.

*Robinson* contra, The plea does not even shew that the liquors supplied were, on each sale, of less than 20s. value. The plea states merely that "no part of the said sum or demand was contracted at any one time to the amount of 20s. or upwards;" it is consistent therefore with the plea, that the liquors, at each sale, were of the value of 30s. and that above 10s. of the price was paid in ready money, so as to leave a less sum than 20s. "contracted" on each occasion. If the sales may have been made, as stated, in the plea, and yet, under such circumstances, as would constitute no illegality, the plea is bad: *Rex v. Chetwynd* (b). It is not enough that the plea has followed the words of the statute: *Peake v. Carrington* (c), *Rex v. Jones* (d). But the words of the statute have not been followed, the plea should have gone on, according to a later part of the section, to state that "the liquors delivered at any one time did not amount to the value of 20s." Assuming, however, that the plea sufficiently raises the question, whether liquors sold to a publican, to be sold again by the latter, are within the act, *Jackson v. Atwell* (e) is a direct authority to shew that they are not, and *Proctor v. Nicholson* (a) and *Spencer v. Smith* (f) are also authorities in the plaintiff's favour. The preamble of the act, which is commonly called the Tippling Act, shews that it was the personal tippling of the vendee that the enactment was directed against. The act must not be construed so as to extend beyond the mischief provided against: per *Holroyd J.* in *Edwards v. Dick* (g), and *Abbot C.J.* in *Lowe v. Nettleton* (h). In *Burne v. Hutchinson* (i) the sale was to the consumer himself.

(a) 7 Q. &amp; P. 67.

(e) 1 Peake, N. P. C. 180.

(b) 7 B. &amp; C. 704; 8 C. 10.

(f) 8 Campbell.

&amp; R. 534.

(g) 4 B. &amp; Ald. 216.

(c) 2 B. &amp; B. 399.


(h) 5 B. &amp; Ald. 501; S. C. 1 D.

(d) 4 B. &amp; Ad. 345; S. C. 1 N. &amp; R. 90.

&amp; M. 78.

(i) 5 B. &amp; Ald. 241.

*Petersdorff* in reply. The plea is good on general demurrer at all events. With regard to the construction of the statute, the enactment itself is clear; the preamble therefore cannot be resorted to, to control it.

1841:  
  
 HUGHES  
 v.  
 DOWE!

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court, and after stating the pleadings proceeded as follows:

Upon the argument in this case an attempt was made rather to shew the insufficiency of the plea as framed; than to rely on the replication as an answer to it; the goodness of the plea, and of the replication as an answer to it, alike depending upon the true construction of stat. 24 Geo. 2, c. 40, s. 12, which is as follows: (His lordship then read the 12th section) and

Against the plea framed upon this section the objection was, that it does not sufficiently appear that the sale of the spirituous liquors was in each instance to a less amount than 20s., and that, consistently with the allegation as it now stands, the sale in each case might have been of a quantity exceeding in value 20s., but reduced by prompt payment to a sum below it, and so each sale not within the prohibition contained in the statute. In considering this question, we think that the plea ought to be read (as was observed by Lord Ellenborough on a similar occasion) like any other composition; and that no violent or forced construction ought to be made beyond the ordinary and fair meaning of the words employed, either to support or to invalidate it. And, so reading this plea, we think that the allegation does sufficiently import that the amount in value of each sale, the aggregate of which sales composed the whole demand, was less than 20s., and therefore illegal (unless the replication be found to contain an answer to it); and that to hold the contrary, in conformity to the argument for the plaintiff, we must adopt an arbitrary supposition, wholly unauthorised

1841.

HUGHES  
v.  
DOWD.

by any thing which appears, and inconsistent with the plain and common sense of the language of the plea.

This being so, we are led to consider whether the replication contains any answer to the plea, and furnishes a ground for the plaintiff maintaining the present action; or, in other words, whether there is any *implied* exception in the statute in favour of a spirit merchant selling spirituous liquors to a publican for the supply of the customers of the latter, and not for his own use and consumption, *express* exception there obviously being none.

And in this part of the argument we were referred to a *nisi prius* case, *Proctor v. Nicholson* (a), according to which Lord Abinger is reported to have held, that the statute did not apply to an hotel-keeper furnishing spirituous liquors to a customer living in his hotel to a smaller amount than 20s. at a time. Supposing this to have been so, it is to be observed that the cases are not *precisely* similar; and, moreover, the contrary was decided by the late Chief Baron Thompson, at *nisi prius*, he having refused to allow the plaintiff (a publican) to recover for spirits sold by him to a customer under the required amount: *Gilpin v. Rendle* (b). And (what is still more material) the same was expressly decided under precisely the same circumstances by this Court, that a tavern-keeper cannot recover for items in his bill under 20s., the goods supplied being spirituous liquors to a customer at his house: *Burnyeat v. Hutchinson* (c).

It remains for us, however, to notice a case (d) which certainly is not distinguishable from it, and which must therefore, if its authority be adopted, determine the present. Lord Kenyon is reported to have held, at *nisi prius*, that the price of spirituous liquors, sold by the agent of a liquor merchant, on his account, to the keeper of an eating-house, in quantities under the value of 20s., was recoverable notwithstanding the statute. And the ground of the decision

(a) 7 C. &amp; P. 67.

(d) *Jackson v. Attrill*, 1 Peake's

(b) 1 Selw. N. P. 55 (10th ed.). N. P. C. 180.

(c) 5 B. &amp; Ald. 241.

is stated to have been, that he “thought this case did not fall within *the mischiefs* intended to be remedied by this act of parliament, the intent of which was to prohibit the sale of such small quantities to *the consumer*; that the liquors were not sold to the defendant for his own consumption, but for the use of guests resorting to his house in the way of his trade, and *therefore* in his lordship’s opinion, not within the act of parliament.”

It now becomes our duty, after argument and upon deliberation (the absence of which circumstances so much impairs the authority of a *nisi prius* decision, whatever weight may be justly due to the opinion of the particular judge), to put our construction upon this statute. The preamble certainly alludes to the mischief noticed by Lord *Kenyon*, the increase of immoderate drinking of spirituous liquors by persons of the lowest sort; which is attributed, in a great measure, to the description of persons who had obtained licences to retail the same, and to those who had presumed to retail the same without any licence. And accordingly, the first eleven sections of the act are directed to the object of putting those persons under better and more strict regulations. Then comes the 12th section, upon which the question turns, and which has been already quoted. Now, that the prohibition is, in terms, of *all* sales of spirituous liquors to a less amount than 20s., it is impossible to doubt. And to introduce an exception not there to be found, and which, if intended, might have been so easily introduced and expressed, is, we think, to curtail and abridge the meaning of plain words in a manner which no rule of construction, of which we are aware, warrants.

We have purposely deferred noticing the language of Lord *Tenterden* in giving the judgment of the Court in the last cited case of *Burnyeat v. Hutchinson* (a), which is to the following effect: “The words of the act are free from doubt. They contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting

(a) 5 B. & Ald. 241.

1841.

*HUGHES*  
v.  
DOWD.

1841.

~  
 HUGHES  
 v.  
 DONE.

to more than 20s. in value at one time. We are, however, desired to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications, and I think, if we did so, we should probably defeat the intentions of the legislature."

We agree to this construction, and think we ought to adopt it. The consequence is, that our judgment must be for the defendant.

Judgment for the defendant.

—◆—  
 MILLIGAN v. WEDGE (a).

A butcher, who had purchased a beast at Smithfield, in the city of London, employed a licensed drover to drive it home. By the by-laws of the city, such beasts must, within the limits of the city, be driven by licensed drovers, unless driven by the purchasers themselves. The drover employed a boy to drive the beast, and through the boy's negligently driving, the beast, after it had

**CASE.** The declaration stated that the plaintiff was possessed of a shew room adjoining a public street, and of divers goods exposed for sale in the shew room, that the defendant, by a certain person employed by him as servant in that behalf, was driving a bullock along the street, and that the defendant by his servant so carelessly and negligently drove the bullock along the street, that the bullock, by reason of the defendant's negligence by his servant, ran into the shew room, and damaged the plaintiff's goods.

Pleas, 1. That the driver of the bullock was not the defendant's servant in that behalf. Issue thereon. 2, Not guilty. Issue thereon.

On the trial before *Williams J.* at the Middlesex sittings in Easter Term, 1839, it appeared that the defendant, who was a butcher, and had purchased a bullock in Smithfield market, in the city of London, employed a licensed drover to drive the bullock to the defendant's premises near Manchester Square, without the city. By the by-laws of the

(a) Decided in Michaelmas Term last, Nov. 18.

passed the limits of the city, ran into the plaintiff's premises and damaged his property.

*Held*, that, although the damage was not done within the city, the boy was not to be deemed the servant of the owner of the beast, and that the owner therefore was not liable.

city, the purchaser of beasts at Smithfield may drive them home himself, but he cannot employ any one to do so for him except a licensed drover. The drover, employed by the defendant, employed a boy to drive the bullock together with other bullocks that were to be driven in the same direction for other purchasers. The damage stated in the declaration was done by the defendant's bullock while under the boy's care, and without the limits of the city. The learned judge was of opinion that the boy was not the defendant's servant, and the defendant had a verdict on the first issue, but the jury having found negligence, the plaintiff had a verdict on the second issue. Leave was given to move to enter the verdict for the plaintiff on the first issue also.

1841.  
MILLICAP  
v.  
WEDGE

*Humfrey*, in the same term, having obtained a rule accordingly,

*Cresswell* now shewed cause. The boy was the servant of the licensed drover, whom the defendant was obliged to employ, and not of the defendant. The question on which the judges of this Court were divided in *Laugher v. Pointer* (a) has been settled in *Quarman v. Burnett* (b), and it is now decided that where the owner of a carriage jobs horses from a stable keeper, who supplies a driver, that the stable keeper, and not the owner of the carriage, is liable for the driver's negligence. In the same case the principle suggested by *Littledale J.* in *Laugher v. Pointer* (a) is adopted to explain the cases of *Bush v. Steinman* (c), and *Randleson v. Murray* (d), viz., "that the rule of law may be that, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed, that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by

(a) 5 B. & C. 547; S. C. 8 D. & R. 559.

(c) 1 B. & P. 404.

(d) 8 A. & E. 409; S. C. 3 N.

(b) 6 M. & W. 499.

& P. 239.

1841.

MILLIGAN  
v.  
WEDGE.

contractors or their servants. 'The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises.' It is to be remembered that in this case the boy drove other bullocks besides the bullock belonging to the defendant; this may have contributed to the accident; and the defendant had no such control over the boy as would have enabled him to prevent the boy from driving the other bullocks.

*Humfrey* contra. The by-laws of the city would not oblige the defendant to employ a licensed drover after the bullock had been driven beyond the limits of the city. [*Cresswell* said he would not rely on the necessity of employing the licensed drover out of the city.] The defendant is liable unless *Bush v. Steinman* (a) and *Randleson v. Murray* (b) are overruled, in neither of which cases is the distinction of *Littledale J.* in *Laugher v. Pointer* (c) at all adverted to. [Lord *Denman* C. J. My brother *Littledale* in that case observes, that "the jobman was a person carrying on a distinct employment."] The master porter in *Randleson v. Murray* (b) carried on as distinct an employment as the licensed drover in the present case. He cited also *Huggett v. Montgomery* (d), *M'Intosh v. Slade* (e).

LORD DENMAN C. J.—I think we are bound by the authority of *Quarman v. Burnett* (f), though I am not sure that I accede to all the observations made in the judgment, as to the distinction between injuries done by fixed and by moveable property. But the other distinction of my brother *Littledale* in *Laugher v. Pointer* (c), between the liability of a party employing his own servant, and the liability of a party employing a person who follows a distinct and inde-

(a) 1 B. &amp; P. 404.

(d) 2 B. &amp; P. (N. R.) 446.

(b) 8 A. &amp; E. 109; S. C. 3 N. &amp; P. 239.

(e) 6 B. &amp; C. 657; S. C. 9 D. &amp; R. 738.

(c) 5 B. &amp; C. 547; S. C. 8 D. &amp; R. 556.

(f) 6 M. &amp; W. 499.

pendent occupation of his own, is I think applicable in the present case. The defendant, a butcher, employed a drover, whose calling specially qualified him for the task intrusted to him, and the drover furnished his own servant for the purpose, and the latter did the act complained of. The drover, in my opinion, is the party liable, and not the defendant. It is certainly most desirable in cases of this kind that there should be some known and ostensible person to whom the party injured may readily look for redress, and this consideration would go far to reconcile one to the distinction between owners of fixed and of moveable property. In *Randleson v. Murray* (a), as the injurious act was done by the porter on the defendant's premises, the porter may be taken to have been under the defendant's control, and the act to have been done by the defendant himself. It does not appear that the defendant in this case was with the drover's servant when the injury was done, and it was done in the course of the ordinary business of the drover, and not of the defendant. I think the defendant is not liable.

LITTLEDALE J.—As the view taken by Lord *Tenterden* and myself upon the present subject has been confirmed by the Court of Exchequer, it is unnecessary for me to add any thing now.

WILLIAMS J.—The only difficulty in these cases is to say whose servant it is that has done the injury : when that is ascertained, the difficulty is got rid of. And I think that, where the act complained of is done by a person employed in the exercise of a distinct and independent business, it cannot be said that he is the servant of his employer. I agree to the decision of *Randleson v. Murray* (a); the porter in that case, whether hired by the day or the year, was equally under the control of the owner of the warehouse who employed him. Mr. Justice *Story* (b) seems to put

(a) 3 A. & E. 109; S. C. 3 N. & P. 239.

(b) On agency, see ch. 17, and note 5 at p. 405. (London, 1839).



1841.

  
MILLIGAN  
v.  
WEDGE.

the point in this way, whose servant was the person who did the injury? The defendant, a butcher, whose own business does not appear to have qualified him for the task of driving the bullock, deposes a drover, by whose servant the injury was done, and I think the drover is liable for the negligence of his servant.

COLERIDGE J.—The true test is the relation between the party charged and the person who does the injury. Unless the relation amount to that of master and servant the party charged is not responsible. Whether the injury was done by the drover or his boy is immaterial. The question is, what was the relation between the drover and the defendant? We may take it that the injury was done by the drover himself. The defendant made a contract with the drover that the latter should drive the beast, and the defendant left the beast under his care. Under these circumstances I think that the relation of master and servant did not subsist between the defendant and the drover, and that the defendant is not liable for the act of the drover.

Rule discharged.

END OF HILARY TERM.

1841.

## SITTINGS AFTER HILARY TERM.

The QUEEN v. POWELL, Steward of Richmond Manor.

Saturday,  
February 6th.

**MANDAMUS** to *J. A. Powell*, steward of the manor of Richmond, otherwise West Sheen, in the county of Surrey, commanding him to hold a court and admit *Elizabeth Streater Halford* as tenant to a copyhold tenement of the manor surrendered by one *H. Lacelien* to the use of *E. S. Halford* and her heirs, according to the custom.

1. Where a return to a mandamus is set down for argument on a concilium, the defendant may take objections to the writ in matters of substance.

The return stated that the Queen was seised in fee in right of her crown of and in the manor; and then set out various customs in the manor, for the purpose of shewing that *E. S. Halford* was not entitled to be admitted; but it is not material to state them here, as upon the case coming on for argument on a concilium, in the sittings after last Michaelmas term (*a*), Sir *J. Campbell* A. G., who appeared in support of the return, stated that he should object that the writ itself was defective by reason of its being directed to the steward alone; and that, inasmuch as the Queen was the lady of the manor, no mandamus would lie at all.

2. A mandamus will not lie to compel the admission of a customary tenant to a royal manor.

3. The Queen still remains lady of the royal manors, notwithstanding 10 Geo. 4, c. 58, whereby certain powers over crown lands are conferred on the commissioners of woods and forests.

The case was argued therefore upon this point (and incidentally upon the question, whether after the return an objection could be taken to the writ), by *J. Scriven* in support of the writ, and Sir *J. Campbell* A. G. contra. The following statutes and authorities were cited: 10 Geo. 4, c. 50, 57 Geo. 3, c. 97, 1 *Scriven* on Copyholds, 145, 3d ed., *Kitchen* on Courts, 83, (5th ed.) *Co. Litt.* 58 a, *Melwich* v. *Luter* (*b*), *Reg. v. Whitford* (*c*), *Rex v. Coggan* (*d*), *Harris* v.

4. A mandamus to admit to a copyhold tenement must not be directed to the steward only: the lord must be joined.

(*a*) Nov. 27th and 28th, before Lord Denman C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*b*) 4 Rep. 26 a.

(*c*) 7 Dowl. P. C. 709. This was a rule for a mandamus to Mr. *Evans*, steward of the manor of Witchford, commanding him to accept a surrender into the hands

of the lord, according to the custom of the manor. The Court after hearing Sir *J. Campbell* A. G. against the rule, and *Kelly* in its support (May 27, 1839), discharged the rule on the ground that the lord should have been made a party to the rule.

(*d*) 6 East, 431.

1841.

*The QUEEN*  
v.  
*POWELL.*

*Jay (b)*, 1 *Roll. Abr.* 539, 2 *Watkins* on Copyholds, 18, 1 *Vict. c.* 2.

The arguments are fully stated in the following judgment of the Court, which, after time taken to consider, was now delivered by

Lord DENMAN C. J.—This was a mandamus to *John Allen Powell*, steward of her Majesty the Queen's manor of Richmond, otherwise West Sheen, in the county of Surrey, to hold a court and admit *Elizabeth Streater Halford* as tenant of a piece of copyhold land, parcel of the said manor, and a customary tenement of the said manor.

The return stated a custom in the manor and various facts as to the custom connected with their customary tenements, and also other customary tenements within the manor, which by the defendant were treated as applicable to the present case, so as upon the whole to excuse himself from complying with the mandamus.

This mandamus and return have been set down on a concilium in the crown paper for argument. On the argument, the counsel for the defendant argued that the return was sufficient; and he also contended, that whatever might be the question on the return, either in form or substance, the writ of mandamus was in itself insufficient, and that, if that were so, the writ must be quashed.

There are cases where it has been held that, after a return to a mandamus, the Court will not allow the validity of a writ of mandamus to be questioned; but on a concilium, where the whole record is set down for argument, the defendant has a right to object to the writ of mandamus in matters of substance, as much as a defendant has a right to object to a declaration, where the whole record is set out upon demurrer or writ of error after plea in civil proceedings, or, if there was an indictment and special pleas to it, the defendant would have a right to object to the indictment.

1841.

The QUEEN  
v.  
POWELL.

The objection here is to matter of substance, and may be taken into consideration as to whether it be sufficient or not. The defendant objects that the writ of mandamus is directed to the steward alone, and that the lord of the manor is not joined in it. Since writs of mandamus have been directed to compel the admission to customary or copyhold estates, they have been sometimes directed to the lord and steward jointly, and sometimes to the steward alone, but at length the Court determined, upon consideration in the case of *Reg. v. The Steward of the Manor of Whitford*(a), that they should not be against the steward alone, but that both the lord and steward should be joined, and that on the ground that the interests of the lord would be thereby more effectually protected. The present writ is not conformable to that decision, inasmuch as it is directed to the steward alone, but the prosecutor contends that the decision only applies to cases where the lord of the manor is a subject, inasmuch as there can be no mandamus to the sovereign. That there can be no mandamus to the sovereign there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment. But then the prosecutor says, that proceedings by mandamus being according to the general course of practice, if it cannot be done by joining the sovereign, it must go against the steward alone. But the reason, given by the Court in the case of the steward of Whitford, being that the interests of the lord ought to be protected, the crown is not to be excluded from the benefit of that protection, and its interests are to be as much guarded as those of a subject, and that, whether the sovereign is to take the profits of the manor to his own use, or whether they are to be appropriated to the public service, as they now are, by the 10 *Geo.* 4, c. 50, which directs the commissioners of the woods and forests to appropriate them; and, if the interests of the crown cannot so effectually be

(a) 7 Dowl. P. C. 709; *S. C. ante*, n. (c).

1841.

~ ~ ~  
 The QUEEN  
 v.  
 POWELL.

protected by a writ against the steward alone, it is a very strong reason to shew that such a writ cannot be sustained. Indeed if it were allowed it is not certain of being effectual, for, if the advisers of the crown were of opinion that its interests might be affected, and were to advise the sovereign either to order the steward not to admit the prosecutor of the mandamus, or to revoke the appointment of the steward, this Court could not grant an attachment against the steward, and then the party does not get admitted. And indeed if we were to allow a mandamus to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the mandamus to the steward alone, when it cannot be affected directly by making the sovereign a party to the mandamus.

We are not aware that any similar writ of mandamus has ever been granted. In 1822, a mandamus was issued, directed to the steward of the royal manor of Castlerigg, in the county of Cumberland, to admit a customary tenant, but we have not learnt what was done upon it. But, whatever may have been done, we have to remark that, though the manor of Castlerigg was there called a royal manor, it was not vested in the crown. That manor was part of the estates of the Earl of *Derwentwater*, which were forfeited to the crown on the attainder of that nobleman. These estates, subject to some charges, were by the act 22 *Geo. 2*, c. 52, divested out of the crown and vested in trustees for an estate of inheritance for the benefit of Greenwich Hospital; and on referring to the act, which is given at length in a collection of the statutes called *Ruffhead's Statutes*, though only the title is given in the collection called *Runnington's Statutes*, it appears that the manor of Castlerigg is enumerated amongst the possessions which were the subject of the act of parliament, and therefore that instance, even if it had been acted upon, would not go to sanction the present proceeding.

But, though the prosecutor cannot have a writ of mandamus, he is not without remedy; he is in the same situa-


tion as a person similarly situated would have been before this Court was in the course of granting writs of mandamus to lords of manor and stewards, to admit claimants to customary or copyhold estates. These writs of mandamus do not appear to have been issued prior to the year 1772 or 1773. Before that time, even in the case of a private person, who wished to be admitted to a customary or copyhold tenement, he was to proceed by bill in equity to compel an admission. But in the case where there is a complaint, on the part of a subject against the crown, in any matter whatever, the course is to proceed by petition of right, or else by *monstrans de droit* or traverse of office, as the case may require; these proceedings have been recognised and acknowledged for many centuries. Such proceedings are now very much out of use, and few instances in modern times have occurred where they have been resorted to, but still they are what must be resorted to if any dispute arises; they are probably expensive and tedious, but these considerations are not sufficient for our dispensing with them. We have no more authority, for the sake of convenience, to lay them aside and introduce writs or other proceedings, which are usually adopted between subject and subject, amongst which these writs of mandamus are to be reckoned, than to introduce writs and other proceedings now solely used in cases of prerogative in causes between subject and subject.

But then it is said that the Queen is no longer lady of the manor, inasmuch as the statute 10 *Geo.* 4, c. 50, has introduced a new arrangement as to the landed property of the crown. That statute has taken the management of the landed estates of the crown out of the crown itself, and vested the management of and powers over those estates in the commissioners of the woods and forests, who are to lease the estates and receive the rents and profits into their own hands, or those of their managers or bailiffs, and to dispose of and regulate the estates as they think best for the public service of the country.

1841.

~ ~  
The QUEEN  
v.  
POWELL.

1841.

  
The QUEEN  
v.  
POWELL.

The 8th and 14th sections of the act empowers the commissioners to do a great many things, which can only be done by the owners of estates, and amongst other things to appoint stewards of manors with a salary; but that makes no difference as to the principle of the case: and the stewards are authorised to hold courts; but the meaning of that is, that they may hold them by virtue of the appointment to their office by the commissioners of woods and forests, in the same way as if they were appointed by the crown; but it gives no right to the subject to proceed against them in any matter which may affect the interests of the crown in any other way than could have been done before that act of parliament, and which was by the usual course of prerogative proceedings. There are powers to be exercised which, being given by parliament, are quite consistent with their not having the legal estate in them; and the legal estate is not divested out of the crown, and remains as it was, and the Queen is still the lady of the manor, and in all legal proceedings must be treated as such. Indeed if the commissioners of woods and forests were to be treated as lords of the manor, there would be two objections to the present writ of mandamus on that ground. The first is, that the writ of mandamus would be misconceived in being directed to the defendant, the steward of the Queen's manor of Richmond, because it ought to have been directed to him as the steward of the commissioners of woods and forests, lords of the manor of Richmond, and the description of the office of the defendant in this respect may be said to be material, because, as this Court would be bound to take judicial notice of who were the lords of the manor, if they became so by act of parliament, they could not properly direct a writ of mandamus to any one as steward of one of the Queen's manors, when by law all the manors which she would otherwise have had were not hers, but were vested in other persons. The second objection would be, that, if the commissioners of woods and forests were the lords of the manor, they ought, according to the rule in the case

of the steward of Whitford, to be joined with the steward, the interests of the lord ought to be protected, and certainly not the less so because they are trustees for the public, and there is not the same incongruity as there would be in the case of a mandamus to the Queen in commanding herself.

However, these objections need not be particularly considered, because we think that the manor is not vested in the commissioners of woods and forests, but remains in the crown.

Upon the whole of this case, we are of opinion that this writ of mandamus is not well founded in law, and that it must be quashed.

Judgment for the defendant.

A.

SCOTT *v.* VANSANDAU.

*R. V. RICHARDS*, in Michaelmas term last, obtained a rule to shew cause why the defendant should not have leave to revoke his submission to reference.

The facts upon which the application was founded are stated in the judgment of the Court.

Sir *W. W. Follett* shewed cause against the rule (a).

*R. V. Richards* and *Cleashy* contra, cited *Phipps v. Ingram* (b), *Clarke v. Stocken* (c).

*Cur. adv. vult.*

(a) In M. T. last (Nov. 25), before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(b) 3 Dowl. P. C. 669.

(c) 5 Dowl. P. C. 32.

taking to raise the question of its admissibility on his award, but declining to pledge himself to state all defendant's objections.

Defendant applied to the Court for leave to revoke his submission, on the ground that the evidence had been improperly admitted, and that by its admission the arbitration would be much protracted and the expense increased.

*Held*, no ground for leave to revoke the submission, although the admissibility of the evidence appeared to the Court very doubtful.

1841.

The QUEEN  
*v.*  
POWELL.

Thursday,  
January 28th.

All matters in difference in a cause were referred by order of nisi prius, the arbitrator to have power to reserve points of law for the Court. Evidence tendered at the arbitration was objected to by the defendant on several grounds. The arbitrator considered the objections valid, but received the evidence, under-



1841.

SCOTT

v.

VANSANDA U.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—The Court has been moved, under the recent act 3 & 4 *Will.* 4, c. 42, to permit the defendant to revoke his submission to an agreement of reference under circumstances of a peculiar nature, which have required our serious consideration.

The action was brought some years ago, by a writer to the signet in Edinburgh, to recover compensation for agency business performed for the defendant, an attorney in London. It came on for trial before me on December 10th, 1839; and the whole evidence that was heard consisted of the depositions of witnesses examined in Scotland, upon interrogatories under a commission directed by one of the judges of this Court. To the regularity of these proceedings and their admissibility two very strong objections were offered, subject to which I thought it best to receive the documents. The case was however in all respects most proper to be decided by arbitration; and, after repeated recommendations from myself at a late hour, when but a portion of the plaintiff's evidence was gone through, both parties agreed to a reference. In justice to the defendant, it should be stated that he had previously to the trial proposed a reference, with the condition that power over the costs of the cause should be entrusted to the arbitrator, a condition which appeared to me far from unreasonable, and to which at length the plaintiff acceded. For the purpose, however, of keeping alive his objections to the proceedings under the commission, the defendant expressly stipulated that he should retain the right of objecting to them before the arbitrator, who was to have the same power as a judge at nisi prius to decide as to the admissibility of the evidence, and reserve points of law for the decision of the Court. The evident meaning was, that the award should be made subject to these exceptions, and liable of course to be set aside if they were well founded.

The judge was requested to name the arbitrator, and selected a gentleman of high station and character at the

bar, who undertook the inquiry. About eleven months after, and when some meetings had been held, the defendant obtained the present rule, which does not proceed on the stipulation referred to, no award having been made, nor the objectionable evidence finally received, but which brings before us affidavits detailing communications between the arbitrator and the defendant.

1841.  
~~~~~  
SCOTT  
v.  
VANSANDAU.

The above-mentioned depositions were tendered by the plaintiff in evidence, and the objections to them urged. The arbitrator, pressed to declare whether he would receive them in evidence or not, wrote a paper, in which he declared his intention of receiving them, in order to enable the defendant to bring the matter at this period before the Court.

Whether the evidence ought to be received, or whether the formidable objections raised against it ought to prevail, is at least open to the gravest doubt. But the plaintiff, in shewing cause against the rule, has not chosen to defend the evidence. He merely contended that the stipulation already noticed was the security provided by the defendant for himself against the chance of any error that may affect the award, and that we ought not to anticipate the discussion. He undertakes to shew, when it arrives, that the evidence is admissible in point of law, but declines now to take up the controversy.

There is another complaint against the arbitrator. He refuses to pledge himself to raise on the face of his award all the objections that the defendant may bring forward, and reserves to himself a discretion on the subject. On this we must at once declare our opinion that he takes a correct view of his duty. The analogy of *nisi prius* makes this clear. If the award reserves points, the Court will decide them; if it should omit any which the defendant may think ought to have appeared, the defendant will undoubtedly be free to avail himself of the stipulation in the order of reference, and call upon us to set aside the award in consequence.

1841.

SCOTT  
v.

VANSANDAU.

But we are now desired to prevent this from ever taking place, by an immediate revocation of the arbitrator's authority, because he has declared an intention to decide in a manner supposed to be erroneous. We must then be perfectly convinced that such decision would be erroneous. Can we say so without hearing the argument of the other party? He indeed declines to appear in its support; but he assigns a reason, which we must allow to be sufficient.

Perhaps we might stop here: but the subject is important; and a further consideration of it may not only be useful in the present case, but as suggesting general rules for the future. The arbitrator is not bound by the declaration of his intention to admit the disputed evidence; but, on the contrary, after hearing and maturely weighing all that can be urged on either side of the question, he is then to form his judgment and act accordingly; and the Court will presume that his conclusion will be just. Again, if the legal objections to this evidence are in themselves fatal to it, and nothing which has occurred between the parties can remove them, we ought to give credit to the plaintiff's advisers for that degree of common prudence which counsel exercise in the conduct of their cases, in withdrawing the evidence that may endanger their verdict. Or, even if the evidence should be received, the award may possibly be such as to satisfy the losing party that justice has been in fact done, and that he ought, as an honest and wise man, to acquiesce in it, though its correctness may admit of some question.

In any one of these three events, all of which are to be contemplated as possible terminations of the case at nisi prius, the matters in difference will have been well disposed of, to the great benefit of both parties. But, if the evidence shall be insisted on by the plaintiff, and received by the arbitrator, and if the defendant shall think the award so injurious to him that he ought to labour at reversing it, then he may resort to the remedy provided at his own suggestion in the order of reference, and raise his objections

for our decision. It is true that, in this case, all the expense and time will have been consumed in vain: but the contingency may never happen; and, if we now revoke the arbitrator's authority, all the same waste will be incurred up to the present stage of the inquiry. Nor would the matters in controversy be then sent to a new arbitrator: the consequence must be the restoration of the cause to the Middlesex list, in which there would be no chance of its coming on for trial for many months. When called on, the presiding judge would soon discover that it could not be properly decided by a jury; and, if his advice to submit it again to reference should be adopted, the same career of litigation would be opened for the second time. On a balance, therefore, of the conveniences and inconveniences that await our decision on the one side or the other, we have no doubt that the continued progress of the inquiry before the arbitrator, with the hope of his coming to a just and satisfactory conclusion, holds out the prospect of greater benefit and lesser evils to both parties.

We abstain from general remarks on the duties of those who submit their causes to arbitration, and of those gentlemen who undertake an office so highly advantageous to the ends of justice. Resorted to on proper occasions, the jurisdiction is of inestimable value. We give no opinion how far such questions as have been raised in this case ought to be pressed upon an arbitrator, or answered by him: but manifestly no interlocutory proceeding ought to be encouraged. Nor do we make any remarks on the two cases cited, except that they are by no means binding authorities in this. We will only observe that the discretion of the Court, to which this appeal is made, ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the flood-gates for multiplied expenses and interminable delays.

Rule discharged.

1841.

SCOTT

v.

VANSANDAU.

1841.

In the matter of Arbitration between *WRIGHT* and others  
and the *CROMFORD CANAL COMPANY* (a).

By an award, made under a submission which gave no power to raise questions of law for the opinion of the Court, an arbitrator awarded 82*l.* as compensation for damage, to be paid by one party to the other. He then, "for the purpose of raising the question for the determination of the Court, in case it should be pleased to entertain the same," explained the principle on which he had awarded the 82*l.*, and added that, if the Court should think that he ought to have gone on another principle, which he mentioned, he then awarded 102*l.* in lieu of the 82*l.*

*Held*, that the award was final, as it awarded 82*l.* positively, and the hypothetical assessment which followed

**RULE** to set aside an award, by which certain sums of money were directed to be paid by the canal company to *Wright* and others in respect of damage done to their mines by the canal.

The submission to arbitration was by an indenture, which contained the usual clause for making the submission a rule of court, but gave no authority to the arbitrator to raise points of law for the opinion of the Court.

Several special objections, which turned upon the construction of the Company's act (29 *Geo.* 4, c. 74), were made to the award. An objection was also made to it for want of finality. The award, among other things, ordered the Company to pay *Wright* and one *Jessop* 82*l.* for damage sustained by them in being prevented from getting certain coal from a mine, and then proceeded thus: "And for the purpose of raising the question for the determination of her Majesty's Court of Queen's Bench (in case the said Court shall be pleased to entertain the same), we do hereby declare and state, upon this our award, that, in adjudging to the said *Francis Wright* and *William Jessop* the sum of 82*l.*, as the estimated value of the portion of coal left ungotten, &c. our calculation has proceeded upon the ground that, under the in part recited act, the workers are entitled to receive the value of the coal or ironstone ungotten in a mine in the course of working, which they have been restrained from getting, and which otherwise, and in the ordinary course of working, would have been got, including due allowance for the capital and interest invested in opening the coal field, and winning and working the mine, but not the full profit which they would have made had the coal been raised. But, in case the Court of Queen's Bench

(a) Decided during the term (Jan. 12).

was surplusage.

shall be of opinion that the workers of the mine are entitled to the full profit they would have made had they not been prevented from getting the coal and ironstone, then we find the value of the portion of coal so left to be 102*l.*; and which sum we order and award to be paid by the said Company to the said *Francis Wright* and *William Jessop*, in lieu of the said sum of 82*l.*; or, in case the said Court shall be of opinion that the workers are not entitled to receive from the said Cromford Canal Company compensation for the causes aforesaid, either in respect of their capital and interest, or for the full profits they would have otherwise made, but only for the expenses previously incurred in winning (or preparing to be got) the said coal and ironstone, and for the disadvantages occasioned to the coal and ironstone remaining to be got in the said mines, then, in lieu of either of the said sums of 82*l.* or 102*l.*, we find the value of such coal left to be 25*l.*; and we award and order that the said Cromford Canal Company shall pay to the said *Francis Wright* and *William Jessop* the sum of 25*l.* and no more, in lieu of the sum of 82*l.* so awarded as aforesaid."

1841.

In re  
WRIGHT and  
CROMFORD  
CANAL  
COMPANY.

Sir *W. W. Follett*, *Hill* and *K. Macaulay* shewed cause (a).

Sir *F. Pollock*, *Erle* and *Hoggins* supported the rule.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court, which, as to the objection for want of finality, was as follows:—The objection is that the award is not final, inasmuch as the arbitrators and umpire refer points of law to the Court without authority to do so. Had the arbitrators abstained from deciding the points of law themselves, and simply found the facts, leaving the law to be applied to

(a) In Trinity term last (June 16), before Lord *Denman* C. J., *Littledale* and *Patteson* Js.

1841.

In re  
WRIGHT and  
CROMFORD  
CANAL  
COMPANY.

them by the Court, this objection would have been tenable. But the case is otherwise. The arbitrators have decided the law, and the award would be sufficiently decisive and final, if the Court were to refuse to entertain any question as to the points of law at all, as not being properly raised. Again, taking the points of law to be properly raised for the opinion of the Court, to the extent of enabling, and indeed calling upon, the Court to say whether the arbitrators have decided them properly, a doubt might possibly be raised whether, if the Court thought them improperly decided, the hypothetical finding and assessment in the award could stand, or whether the award must not be set aside in toto. This doubt, however, does not arise, inasmuch as we are of opinion that the arbitrators have decided the points of law rightly, and that the award is perfectly good.

All that appears upon it subsequent to the decision of the arbitrators is inoperative and surplusage, and need not be regarded.

The rule therefore for setting the award aside will be discharged with costs.

Rule discharged.

In re the Arbitration between SALKELD and HARRISON  
and SLATER (a).

On a reference to arbitrators, and, if they disagree, to an umpire, it is the duty of the umpire, if the case comes before him, to rehear the witnesses who

have been examined before the arbitrators.

If, instead of doing so when required, he makes his award on testimony as taken by the arbitrators, the award will be set aside.


The objection to an umpire so making his award may be waived, but the waiver must be made out clearly.

*W. H. WATSON*, on a former day in this term, obtained a rule to shew cause why the award in this case should not be set aside.

It appeared that by a bond of submission, which had afterwards been made a rule of court, all matters in differ-

(a) Decided during the term (Nov. 24).

ence between the parties had been submitted to two arbitrators, and, in case of their not agreeing upon their award within a limited time, then to an umpire. The umpire was to make his award by July 1st, 1840.

1841.  
  
 In re  
 SALKELD and  
 HARRISON and  
 SLATER.

The arbitrators duly entered upon the arbitration. On the hearing of the case before them much conflicting testimony was given. They did not make their award in time, and the case was then submitted to the umpire.

The ground on which this rule was applied for was, that the umpire had made his award on reading over the evidence taken by the arbitrators, and had refused, although requested to do so on behalf of *Slater* and *Harrison*, to have the witnesses examined before him.

The affidavits in support of the rule stated that, on the 10th of June, 1840, the umpire had been requested to fix a meeting, and to have the witnesses examined before him; that the case was one in which it was important that the witnesses should be so examined, and that no assent to the umpire taking the evidence from the arbitrators' notes had been given. The umpire held two meetings, one on the 24th and the other on the 26th June. The umpire on those occasions refused to take evidence vivâ voce, except as to any new matter which had not been in evidence before the arbitrators. The umpire published his award on the 1st July.

The affidavits in opposition to the rule stated that above twenty days had been employed in taking evidence before the arbitrators; and one of the arbitrators deposed that the umpire had declined to act on account of the length of time which the proceedings would occupy; that *Slater* then assured the umpire that a very short time only could be required for the case, as all the evidence had already been taken by the arbitrators, and that all that the umpire would have to do, unless he required further information, would be to read their notes. The other arbitrator made no affidavit.



1841.  
 ~~~~~  
 In re  
 SALKELD and  
 HARRISON and  
 SLATER.

Sir *F. Pollock* and *Chambers* shewed cause. [Lord *Denman* C. J. There can be no doubt of the general rule, that the party who is to decide must hear the witnesses.] They then relied upon the laches of the parties in applying to the umpire to hear the witnesses at so late a period that, if he had heard them, he could not have made his award in time, and contended that the case was the same in principle with *Hall v. Lawrence* (a), where the Court refused to set aside the umpire's award, as he had not been required to re-examine the witnesses before the making of his award. They also commented on the facts as amounting to a waiver of the right to insist on the *vivâ voce* examination of witnesses.

*Cresswell* (with whom was *W. H. Watson*) *contra*. The waiver should be clearly made out, as *In the matter of Tunno and Bird* (b), especially in a case like the present, where the evidence, being of a conflicting nature, made it so desirable that the witnesses should be re-examined before the umpire. If the application to the umpire to re-examine was too late, the time for making the award might have been enlarged by a judge, under 3 & 4 *Will.* 4, c. 42, s. 39: per *Parke* B. in *Hall v. Rouse* (c), *Potter v. Newman* (d), *Burley v. Stephens* (e). (He was then stopped.)

LORD DENMAN C. J.—This case may not be quite satisfactory with respect to the motives which have suggested the application. But it is most important that it should be understood to be the duty of the umpire, as well as of the arbitrators, to see and hear the witnesses. In this case it was especially important, as the case before the arbitrators had been one of conflicting evidence. No doubt the right to have witnesses re-examined before the umpire may be waived, but I do not think the waiver is made out in this

(a) 4 T. R. 589.

(b) 5 B. & Ad. 488; 2 N. & M.  
328.

(c) 4 M. & W. 26.

(d) 2 C., M. & R. 742.

(e) 1 M. & W. 156.

case. On the 10th of June the umpire had notice that he would be required to examine witnesses. He ought then to have proceeded to do so in the best manner he could, and he might have applied to the Court, if necessary, to enlarge the time, for I think that the proviso at the end of section 39 of 3 & 4 *Will.* 4, c. 42, may be construed to give the Court power to enlarge generally, and not merely under the special circumstances there mentioned. At all events he might have applied.

1841.

In re  
SALKELD and  
HARRISON and  
SLATER.

LITTLEDALE and WILLIAMS Js. concurred.

Rule absolute (a).

(a) *Coleridge* J. was in the Bail Court, *Patteson* J. at the sittings in nisi prius.

ALLEN v. FLICKER and another (b).

CASE for distraining the plaintiff's goods for rent, and selling them without having them appraised by two sworn appraisers, as required by 2 *W. & M.* sess. 1, c. 5, s. 2.


Plea: that the rent so distrained for was under 20*l.*, to wit, 1*l.* 12*s.* 6*d.*, and that therefore the plaintiff had not had the goods appraised by two sworn appraisers. Verification.

Special demurrer, on the ground that the plea attempted to raise an immaterial issue, as to whether the rent distrained for was under 20*l.*; that, if the rent distrained for was under 20*l.*, this would be no answer to the declaration; and that the plea amounted to the general issue. Joinder.

*Heaton* in support of the demurrer. The question is, whether 2 *W. & M.* sess. 1, c. 5, s. 2, which requires that goods distrained for rent shall, before sale, be appraised by two sworn appraisers, has been repealed by the 57 *Geo.* 3,

Although the rent, for which goods are distrained, does not exceed 20*l.*, they must be appraised by two appraisers, under 2 *W. & M.* sess. 1, c. 5, s. 2, notwithstanding the 57 *Geo.* 3, c. 93, an act to regulate the costs of distresses for rent not exceeding 20*l.*, the schedule to which prescribes the sum to be for appraisement, "whether by one broker or more."

(b) Decided in Trinity Vacation, 1839 (June 21).

1841.  
  
 ALLEN  
 v.  
 FLICKER.

c. 93, which regulates the costs of distresses, where the rent in arrear does not exceed 20*l.* The words of the former act are peremptory in requiring the appraisement of two appraisers, without exception, and the latter act has no direct provision whatever on the subject. The schedule, indeed, of the latter act, a "Schedule of the Limitation of Costs and Charges on Distresses for small Rents," contains the following words—"Appraisement, whether by *one* broker or more, 6*d.* in the pound on the value of the goods." But this schedule, which is no part of the act to which it is annexed, cannot have the effect of repealing the express provision of the former statute, and indeed is not necessarily inconsistent with it, for one appraiser may suffice by agreement, or the employment of any appraiser whatever be dispensed with. There are two contradictory decisions at nisi prius on the point; *Fleteher v. Saunders* (a), where it was held, by Lord *Lyndhurst* C. B., that one appraiser is sufficient under 57 *Geo.* 3, and the later case of *Bishop v. Bryant* (b), where *Tindal* C. J., notwithstanding the case of *Fletcher v. Saunders* (a), which was brought to his attention, held that two appraisers were necessary.

*O'Malley* contra contended that the 57 *Geo.* 3, which was passed for the purpose of lessening the expense of trifling distresses, must be taken, in furtherance of that purpose, to have introduced an exception to the former act, and he relied on the authority of *Fletcher v. Saunders* (a).

LORD DENMAN C. J.—I think the schedule prescribing the allowance to be paid for appraisement, whether made by one appraiser or more, is insufficient to repeal the statute of *W. & M.*, which gives the tenant the security of two appraisers.

PATTESON and WILLIAMS Js. concurred.

Judgment for the plaintiff.

(a) 6 C. & P. 747; S. C. 1 M. & Rob. 375. (b) 6 C. & P. 484.

1841.

## ROTHSCHILD and others v. CURRIE (a).

**ASSUMPSIT** by indorsee against the payee and indorser of a bill of exchange for 12,000 francs, drawn by one *Seignette*, the 31st January, at London, upon Messrs *Kernel* and *Boisdon*, at Paris, payable there, three months after date, to the order of the defendant, and by him indorsed to the plaintiffs. Averment, that *Kernel* and *Boisdon* did not pay the bill, although the same was duly presented to them when it became due, to wit, on the 30th April, and thereupon was then duly protested; of all which defendant had due notice.

Plea: that defendant had not due notice modo et formâ. Issue thereon.

The cause was tried before Lord *Denman* C. J., at the London sittings after Trinity term, 1838.

*Seignette* the drawer, and the plaintiffs and the defendant, resided in London, the acceptors in Paris.

The bill in question, which corresponded with the bill set out in the declaration, became due according to the law of France, which allows no days of grace, on the 30th April; and, by the same law, as that day was Sunday, the bill became due and was presented to the acceptors for payment on the 29th April, and was dishonoured.

On Monday, the 1st May, the bill was protested. By the law of France the protest must be registered. The 1st of May being a holiday (the Fête du Roi), the office for registration closed at 12 at noon, and the protest was not registered on that day. On Tuesday, the 2d May, the protest was left for registration, but, from an unusual pressure of business, the registration was not completed until after post time on that evening. On the 3d May the bill and protest were sent to the plaintiffs, and received by them on the 5th. On the same day the plaintiffs gave notice of dishonour to the defendant.

Assumpsit by the indorsee against the payee and indorser of a bill of exchange, drawn in England, and accepted payable in France by a resident in France, the plaintiffs and defendant both being domiciled in England.

Held, that the bill being payable in France was a French bill.

That due notice of dishonour by the acceptor, being one of the conditions on which the indorser had contracted to pay, was part of the contract.

That the lex loci contractus, therefore, must govern the notice of dishonour, and that a notice in conformity with the French law was sufficient.

(a) Decided during the term (Jan. 12).

1841.

ROTHSCHILD  
v.  
CURRIE.

Evidence was given that by the French law registration of protest is required under a penalty, and that fifteen days are allowed for giving notice of dishonour.

The question was, whether the period for giving notice of dishonour was to be governed by the French or English law. His lordship was of opinion that the French law should prevail, and the jury found for the plaintiffs.

It was left to the Court to say whether, supposing notice to be ineffectual by the French law without registration, due diligence had been used in giving the notice.

Leave was given to the defendant to move to enter a nonsuit.

Sir *F. Pollock*, in Michaelmas term following, having obtained a rule nisi accordingly,

Sir *J. Campbell* A. G., *Kelly* and *Petersdorff* shewed cause (a). 'The law of France, being the *lex loci solutionis*, is to govern the construction of this contract: *Robinson v. Bland* (b), *Trimbey v. Vignier* (c), *British Linen Company v. Drummond* (d), *Huber v. Steiner* (e), *Don v. Lippman* (f), *Dues v. Smith* (g), *De La Vega v. Vienna* (h), *Anstruther v. Adair* (i); *Story's Conflict of Laws*, c. 8, ss. 314, 315, 347; *Pothier, Traité du Contrat de Change*, pl. 155. The notice, therefore, which is part of the contract, must also be governed by the French law. By the French law the notice of dishonour was in time, for notice without protest and registration is inoperative: *Code de Commerce*, Art. 165, 175, 176. The French law allows fifteen days for giving notice, but it is enough that it was given without delay: *Darbyshire v. Parker* (k), *Firth v. Thrush* (l). If,

(a) In Hilary vacation, 1840, before Lord Denman C. J., *Little-  
dale, Williams and Coleridge* Js.

(b) 2 Burr. 1077.

(c) 1 Bing. N. C. 151.

(d) 10 B. & C. 903.

(e) 2 Bing. N. C. 202.

(f) 2 Shaw & M'L. 682; S. C.

5 Clark & F. 1.

(g) Jacob, 544.

(h) 1 B. & Ad. 284.

(i) 2 Myl. & K. 513.

(k) 6 East, S.

(l) 8 B. & C. 387; S. C. 2 M.  
& R. 359.

on the other hand, the English law is to be applied, then days of grace are to be allowed for payment, and the notice was in time.

1841.

ROTHSCHILD.

v.

CURRIE.

Sir *F. Pollock* and *Hoggins* contra. As between the plaintiffs and defendant, who were domiciled in England, this is to be taken as an English bill. Notice was to be given in England, and should therefore have been an English notice. Though a penalty is imposed by the law of France for neglecting to register the protest, notice of dishonour might have been given immediately. Article 165 of the Code de Commerce seems rather to apply to the time of bringing the action on the bill than the time of notice. A bill drawn in Ireland on a person resident in England, and accepted by him, is an Irish bill (*a*); this bill, therefore, which was drawn in England on a resident in Paris, is an English bill.

*Cur. adv. vult.*

LORD DENMAN C. J., delivered the judgment of the Court as follows:—This was an action on a bill of exchange drawn in England, in favour of the defendant, on a house in Paris, and payable there. The defendant indorsed it to the plaintiff, both being domiciled in England. The plaintiff remitted it to Paris to be presented for payment. The bill was at three months, which expired on the 30th April. No days of grace being allowed by the French law, and that day being on a Sunday, the bill by the same law became due on the 29th, on which day it was presented and dishonoured. By the French law the bill was to be protested on the day following the dishonour; and, by the 176th section of the Code de Commerce, the notary, or huissier, making the protest, is bound under certain penalties to leave an exact copy of the protest, and inscribe it at length in a register kept at a public office for that purpose.

(*a*) See *Mahoney v. Ashlin*, 2 B. & Ad. 478.

1841.

  
ROTHSCHILD  
v.  
CURRIE.

The 1st May, on which the protest and registration were to take place, was the fête du roi, and the office was therefore closed at twelve. In consequence of this and the pressure on the office by the accumulated business on the 2nd, the notary was unable to complete the registration until after post time on the 2nd. Notice of dishonour was sent by the post on the 3rd, and reached the defendant on the 5th, the same day on which it would have reached him if days of grace had been allowed and notice had been sent immediately. The question in the cause is, whether, under these circumstances, the notice of dishonour was in time.

It was in the first place left to the Court to decide, whether, upon the assumption that it was necessary by the French law to complete the registration before notice could be effectually given, due diligence had, in fact, been used; and upon this point our opinion would be in favour of the plaintiff. It appears to us that the delay was attributable to circumstances over which the notary had no controul, and therefore was satisfactorily accounted for.

In the course of the argument it was almost assumed on the one hand, and not very strongly denied on the other, that it was necessary by the French law to register the protest before notice of the dishonour could be regularly given. On this point we do not intend to express any opinion, because, in our view of the case, it is not necessary to its decision; and we should be cautious not to pronounce any judgment upon a point of foreign law not brought before us. We will only say, in passing, that it depends on the 176th section of the same code, and that, as we read it, there is nothing which satisfies us of any necessary connection between the notice and the registration.

Still, although the delay in question was occasioned by the difficulty of registration, the plaintiff will not be the less entitled to our judgment in his favour, if he can establish two things; that he gave his notice in due time according to the French law; and that the French law is to

govern the decision of the case; and these are really the points on which the case turns.

The first of these depends on the 165th section of the code, which, being appealed to on both sides, we are at liberty, and indeed are compelled, to examine and form our judgment upon; as was done by the Court of Common Pleas in *Trimbey v. Vignier* (a). The language of the section does not make it immediately clear, whether the period of time there specified applies both to the notification of the dishonour and the usual citation in default of payment; or only to the latter. The words are, “il doit lui faire notifier le protêt, et à défaut de remboursement le faire citer en jugement dans les quinze jours qui suivent la date du protêt, si celui-ci réside” &c. But, as no other distinct limit of time is given within which the notice must be given, it seems to us, upon the whole, that the fifteen days and the other proportional allowances of time, which follow, apply to the notice, as well as to the formal citation. The former must be done so much within the period as to allow time for the doing of the latter also, in case of non-payment before it expires.

The second point was admitted properly to depend on this, whether the notification of the dishonour be parcel of the contract, or only an incident to the remedy at law for the breach of it; if it be the former, the *lex loci contractûs* will prevail; if the latter, the *lex loci fori* in which the remedy is sought. And this bill, being payable in France, is a foreign bill; and, although actually made in England, must be taken, as between the drawer and payee, to have been made in France, according to the principle embodied in the civil law maxim, *contraxisse unusquisque in eo loco intelligitur in quo, ut solverit, se obligavit. Dig. lib. xlv. tit. VII. 21.* And, if this be so as between the drawer and payee, it is equally true as between the indorser and the indorsee; the former of whom must be considered as the drawer of a new bill, payable at the same place in favour of the indorsee.

(a) 1 Bing. N. C. 151.

1841.

ROTHSCHILD  
v.  
CURRIE.



1841.

ROTHSCHILD  
v.  
CURRIE.

Is, then, the notice of dishonour parcel of the contract The manner in which, by the 165th section, it is connected with the citation in judgment, would at first raise an impression that it was not, but only a step in the remedy at law; but, upon consideration, we think it is parcel of the contract. The indorser contracts to pay the bill, not primarily or absolutely, but on two conditions; one, the dishonour by the drawee, or acceptor, on due presentment; the other, the due notification to him of such dishonour. Unless these be performed, or some special circumstances have occurred which waive them and are therefore equivalent to performance, the indorser breaks no contract by nonpayment; no liability has attached upon him. Being, in law, a new drawer of the bill, the same state of things is supposed to exist, as between him and the indorsee, as the law supposes between the drawer and payee. He is taken to have assets in the hands of the drawee, and to give the indorsee an order for payment of the bill out of them; but he does not make any contract affecting the liability of his general funds, except on the condition of a due demand on the drawee, the supposed holder of those assets, and a refusal by him to pay, duly notified to himself. If there were any difference in this respect between the two systems of law, this being a French bill, we ought to be guided by the French law; but there is none. The Code de Commerce (Art. 140) describes the obligation of the indorser to the holder as one of "*garantie solidaire*," of guaranty that extends to the whole amount of the bill; and *Pothier* cites the ordinance, which gave the law when he wrote, to the same effect; Contrat de Change, p. 1. ch. v. s. 4. No. 148.

The same learned writer is also of the opinion which we have expressed upon the principal question. At s. 5 of the chapter last referred to, under the title "According to what law must the form of protests be regulated, the time of making them, or of notifying them," he says (No. 155), that for all these things the law of the place where the bill is

payable must be followed ; and the reason he gives shews that he considered the notice to be part of the contract ; for he says, according to the maxim before cited, that the parties must be taken to have contracted in the place where the payment is to be made ; and then adds, that *contracts* must be regulated according to the laws and usages of that place to which the contracting parties must be considered to have submitted themselves, according to the rule, “ In contractibus veniunt ea quæ sunt moris et consuetudinis in regione in quâ contrahitur.” Upon principle, therefore, and this authority, we are of opinion that the French law regulated the time of giving notice of this dishonour ; and, as the notice was given in due time according to that law, our judgment must be for the plaintiff.

Rule discharged.

1841.

ROTHSCHILD  
v.  
CURRIE.



# INDEX

TO THE

## PRINCIPAL MATTERS.

### ACCEPTANCE.

Of goods sold. See FRAUDS, STATUTE OF.

### ACCOUNT STATED.

An I. O. U. in defendant's handwriting, not addressed to any one, but produced by plaintiff, is *prima facie* evidence of an account stated with him. *Douglas v. Holme.* 685

### ACKNOWLEDGMENT.

Of part payment. See LIMITATIONS, STATUTE OF, 2.

### ACTION.

Right of, where plaintiff is contributory to the injury complained of. See NEGLIGENCE,

Where no real damage. See AGREEMENT and CASE.

What interest plaintiff in an action for waste must have. See WASTE. Limitation of. See LIMITATIONS, STATUTES OF. — Under Highway Act. See HIGHWAY, 1.

### ADMINISTRATOR.

See BONA NOTABILIA and EVIDENCE, 5.

### AFFIDAVIT.

See CERTIORARI—QUO WARRANTO —PEACE, ARTICLES OF.

Affidavits to shew want of jurisdiction in magistrates, when inadmissible. See MAGISTRATES.

### AGREEMENT.

Agreement not to bring a writ of error. See ERROR, WRIT OF.

Agreement for a lease to contain covenants, tenant bound by the covenants. See LANDLORD AND TENANT, 1.

*A.*, in 1836, let certain land to *B.* under a building agreement; the rent was to commence at Christmas, 1838, and *A.* to have a right of re-entry in case of non-performance on the part of *B.* *A.* availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st of January, 1839. In Sept. 1838, he had re-let the land to *C.*, at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement:—In an action by *A.* for breaking the first agreement, *held*, first, that the demise in the ejectment was to be taken as the date of the re-entry by *A.*; and

that he was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of the stat. 4 & 5 Will. 4, c. 22,

That it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by the breaking the agreement. *Oldershaw v. Holt.* 307

### AMBIGUITY.

Parol evidence to explain. See EVIDENCE.

### AMENDMENT.

Amendment of writ. See TESTATUM Writ.

1. Where a variance occurred at the trial of a replevin in the terms of the tenancy laid and proved, and the judge at nisi prius refused to amend, but directed the jury to find the facts specially, the Court have no power to give judgment according to the justice of the case, if the opposite party may have been prejudiced by the misstatement.

First plea, in bar to an avowry for rent arrear, tender of the rent claimed in the avowry; second plea, non tenuit:—*Held*, that proof of the tender as pleaded did not support the issue on non tenuit without calling in aid the allegations of the first plea, which cannot be done.

If the judge at nisi prius has refused to amend under 3 & 4 Will. 4, c. 42, s. 23, but has directed the facts to be found specially, and indorsed on the record, the Court has no power to strike out the indorsement, *Knight v. M'Dawall.* 168

2. An indictment for perjury contained three assignments. The first and third assignments being almost identical, the judge who tried the case, in summing up, for the sake of convenience, resolved the three

assignments (into two) and then directed the jury upon that assignment, which stood second in the indictment as the first assignment, and upon the assignments which stood first and third as, together forming the second assignment. The jury found the defendant not guilty on the first assignment, and guilty on the second; meaning, as was admitted, to treat the assignments as they were treated in the summing up, and to find defendant guilty on the first and third, and not guilty on the second. The judge, on application, made an order to amend the *postea*, (from his recollection of what passed at the trial,) by entering the verdict for the crown on the first and third, and for defendant on the second assignment. But the Court, as a matter of discretion, thought that such an amendment should not be made from the judge's recollection.—*Reg. v. Virrier.* 161

### APPEAL.

See BASTARDY—POOR—PROHIBITION, 2.

### APPOINTMENT.

See ESTATE, 2—POWER OF APPOINTMENT.

### APPORTIONMENT.

Of rent. See AGREEMENT.

Of Proceeds of Fi. Fa. See EXECUTION.

### APPRAISEMENT

Although the rent, for which goods are distrained, does not exceed 20*l.*, they must be appraised by two appraisers under 2 W. & M. sess. 1, c. 5, s. 2, notwithstanding the 52 Geo. 3, c. 93, an act to regulate the costs of distresses for rent not exceeding 20*l.*, the schedule to which prescribes the sum to be paid for appraisement "whether by one broker or more." *Allen v. Flicker.* 725

## APPREHENSION.

Warrant of, to secure attendance of witness at the assizes. See EVIDENCE, 8.

## APPURTENANCES.

What passes under the name of. See EVIDENCE, 8.

## ARBITRATION.

*Effect of making Submission a Rule of Court.*

1. Where an agreement of reference, under which an award is made for payment of money, is made a rule of Court, the money is not payable by the *rule*; and therefore execution for the amount cannot issue under 1 & 2 Vict. c. 110, s. 18, which enacts that all rules of Court, whereby any money is payable, shall have the effect of judgments. *Jones v. Williams.* 217

*Duties of Arbitrators, &c.*

2. On a reference to arbitrators, and, if they disagree, to an umpire, it is the duty of the umpire, if the case comes before him, to rehear the witnesses who have been examined before the arbitrators.

If, instead of doing so, when required, he makes his award on the testimony as taken by the arbitrators, the award will be set aside.

The objection to an umpire, so making his award, may be waived, but the waiver must be made out clearly. *In re Salkeld.* 732

3. By order of nisi prius a cause was referred to an arbitrator, with power to reserve points of law for the Court. Evidence was offered before him, to which the defendant objected. The arbitrator was inclined to think the evidence inadmissible, but declared his intention to receive the evidence, but refused to pledge himself to raise on the face of the award all the ob-

jections which the defendant might bring forward to the evidence. Defendant then applied to revoke the submission, on the ground that the reception of the evidence would protract the arbitration, and add greatly to the expense:—*Held*, that there was no sufficient ground for revoking the submission, though the objections to the evidence might be valid. *Scott v. Vansandau.*

725

*Finality of Award.*

4. After dissolution of partnership between *A.* and *B.* they referred all matters in difference between them to arbitration by a deed of submission, which recited that *B.* had deposited with *C. & Co.* (bankers), certain securities for advances to *B.* as surety for *A.*, and that *A.* being indebted to *C. & Co.* in 4000*l.* *B.* had mortgaged to them securities for a sum not exceeding 3000*l.*; there was a proviso that if the arbitrators should award any money to be paid by *B.* to *A.* they should, if the mortgage were still outstanding, authorise such payment to be made to *C. & Co.* in reduction of the mortgage debts, and should further award that *A.* should, at a time to be named by the arbitrators, pay into *C. & Co.* such a sum as would be sufficient to entitle *B.* to have the mortgage discharged, and the securities deposited by him released. The award found that 3221*l.* was due from *B.* to *A.* and that the mortgage was outstanding, and ordered *B.* to pay that sum on certain days, with liberty to pay it in to *C. & Co.* It also ordered that within one month from such payment *A.* should pay into *C. & Co.* "such a sum as would be sufficient to entitle *B.* to have the mortgage discharged and the securities deposited by him released."—*Held* bad for want of finality. *Hewitt v. Hewitt.* 598

5. By an award made under a submission, which gave no power to raise questions of law for the opinion of the Court, an arbitrator awarded 82*l.* to be paid by one party to the other. He then, "for the purpose of raising the question for the determination of the Court, in case it should be pleased to entertain the same," explained the principle on which he had awarded the 82*l.*, and added that, if the Court thought he ought to have gone on another principle, which he mentioned, he then awarded 102*l.* in lieu of the 82*l.*:—*Held*, that the award was final, as it awarded the 82*l.* positively, and the hypothetical finding, which followed, was surplusage. *In re Wright and the Cromford Canal Company.* 730

#### ARREST OF JUDGMENT.

See DEFAMATION, 2—LANDLORD AND TENANT, 2.

#### ARTICLES OF PEACE.

See PEACE, ARTICLES OF.

#### ASSAULT.

Where two justices, on the 29th of Nov. dismissed a charge of assault on the ground that the offence was "not proved," and did not give their certificate of such dismissal under 9 *Geo.* 4, c. 31, until the 10th Jan. following:—*Held*, that the certificate had not been granted "forthwith," within the meaning of sect. 27, and was therefore no bar to an indictment for the same assault.

Where a plea to an indictment for an assault alleged that the defendant had been brought before two justices for the same assault, and that the justices, deeming the offence not to be proved, "*forthwith*" gave the defendant a certificate of such dismissal, and the replication

traversed the giving of the certificate *modo et forma*:—*Held*, (dubitante *Coleridge J.*) that the time of giving the certificate (*inter alia*) was in issue. *Reg. v. Robinson.* 391

#### ASSUMPSIT.

Whether giving up an invalid guarantee, a good consideration. See GUARANTEE. See also VARIANCE.

#### ATTORNEY.

Right of, to rule having the effect of a judgment, for payment of his costs. *Neale v. Postlethwaite.* 623

#### ATTORNEY, WARRANT OF.

See WARRANT OF ATTORNEY.

#### AUCTION.

Conditions of sale not evidence to explain deed of conveyance. See EVIDENCE, 8.

#### BAIL.

Warrant for apprehension of witness to give bail for his attendance at the assizes. See EVIDENCE, 1.

#### BAILEE.

Claim of lien by bailee after sale to third person of the goods deposited. See LIEN.

#### BANKING COMPANY.

Where a plaintiff has recovered judgment and sued out a fruitless execution against the public officer of a banking company under 7 *G.* 4, c. 46, the Court will not give the plaintiff leave to proceed against former members by *sci. fa.* under the 13th section, unless it is made to appear that he has really and bona fide attempted to enforce the judgment against the members for the time being. *Eardley v. Law.* 379

**BANKRUPTCY.**

Security for costs in action brought by trustees of party who had recently become bankrupt. See **COSTS**, 1.

Warrant of attorney, unless duly filed, void against assignees of bankrupts. See **WARRANT OF ATTORNEY**.

Departure from home with *intent* to delay creditors is an act of bankruptcy, although there has been no actual delay of any creditor.

A letter therefore written by a trader during his absence from home, stating that he was absent to avoid writs that were out against him, is admissible evidence of an act of bankruptcy, without proof aliunde that any such writs were out, or that he was under any pressure from creditors.

A contract by a trader to do certain works contained a clause that if he should become bankrupt, or delay proceeding with the works, his employer should have power after a seven days' notice to him, to proceed to employ others to do the works, that the advances made to the trader before his default should be taken as full payment, and that all tools and materials being upon the works should become the property of the employer.

The trader, having delayed to proceed with the works, was served on the 10th April by his employer with notice to proceed. On the 17th April the trader committed an act of bankruptcy.

In trover by his assignees against the employer for tools and materials left upon the works by the bankrupt:

*Held*, that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on the 17th April, before the notice had

expired. *Rouch v. Great Western Railway Company.* 686

**BASTARDY.**

See **CONSTABLE**.

*Order on Putative Father—Appeal to Quarter Sessions.*

1. No appeal lies to the quarter sessions against an order of affiliation made by two justices in petty session, pursuant to the statute 2 & 3 Vict. c. 85, s. 1. *Reg. v. Justices of the West Riding.* 668

*Notice to putative Father — Costs against putative Father — Where parish is Part of a Union, by whom the Application for an Order of Maintenance may be made.*

2. Where a person charged at the petty sessions, as a putative father, appears there, and, under 2 & 3 Vict. c. 85, desires that the case should be heard at the quarter sessions, and enters into his recognisance to answer the charge at the latter sessions, to be held on a stated day, and to abide the judgment of that court and to pay all costs, it is not necessary at the hearing to prove that he has had notice for the hearing at the quarter sessions, or that he had notice originally for the petty sessions.

Where the quarter sessions make an order adjudging a party to be the putative father, they cannot thereby award costs against him; but, if so much of the order as relates to costs can be separated, it is good for the remainder.

Where a bastard becomes chargeable to a parish forming part of a union, although it is not a union for the purpose of rating under 4 & 5 Will. 4, c. 76, s. 34, either the overseers of the parish may apply for an order upon the putative father for its maintenance, or (dubitate *Coleridge J.*) the guardians of



*the union.* *Reg. v. The Justices of*  
*Wiltshire.* 406

*What amounts to a Hearing of a Bastardy Application at Quarter Sessions, so as to give the Sessions jurisdiction to award Costs to Putative Father.*

5. The overseers of a parish had given notice to a person of an intended application to the quarter sessions for an order on him as the putative father of a bastard child, under the stat. 4 & 5 Will. 4, c. 76, s. 72. The overseers, pursuant to the rules of the sessions, entered their intended application in a book kept for that purpose, but did not further appear to pray any order. The case was called on, and the defendant appeared:—*Held*, that the entry was an application within the meaning of the statute, and that the calling on the case and appearance of the defendant were a hearing, and that therefore the quarter sessions had jurisdiction to award costs to the party intended to be charged as the putative father. *Reg. v. Stamper.* 539

#### BILL OF EXCHANGE.

Bill accepted on blank bill stamp before passing of statute imposing new stamp and filled up afterwards. See *STAMP*, 3.

*Authority to indorse Partnership Bills after Dissolution of Partnership.*

1. Notwithstanding a dissolution of partnership, one partner has authority to indorse, in the name of the partnership, bills drawn by the firm and accepted before the dissolution, and the partnership will be liable to a bonâ fide indorsee on such an indorsement, though he had then notice of the dissolution. *Lewis v. Reilly.* 629

*Plea amounting to constructive Denial of Indorsement.*

2. To a declaration against the ac-

ceptor of a bill of exchange, indorsed by the drawer to the plaintiff, the defendant pleaded that he accepted it on account of a debt due from him to the drawer; that the drawer indorsed it in blank and delivered it to the plaintiff, as agent for R., for the purpose that the plaintiff should deliver it to R. in payment of a debt due from the drawer to R.; that the plaintiff gave no consideration for it and wrongfully detained it, in breach of his duty as R.'s agent; that R. claimed to be entitled and dissented from the plaintiff's suing:—*Held*, on motion for judgment non obstante veredicto, that the plea amounted to a constructive denial of the alleged indorsement to the plaintiff, and was therefore good after verdict. *Adams v. Jones.* 174

#### *Notice of Dishonour, Evidence of.*

3. In an action on a bill of exchange, issue was joined on a traverse of the notice of dishonour, the only evidence of it was a conversation in which the witness said to the defendant, "I think you ought to pay." The defendant said, "I have no other intention, and do not mean to avail myself of the informality of the notice of dishonour:—*Held*, to be evidence from which the jury were at liberty to presume a due notice of dishonour. *Brownell v. Bonney.* 523

4. Action by indorsee against the payee of a bill of exchange, drawn in England on and accepted by a house at Paris; both plaintiff and defendant were domiciled in England.

*Held*, that the bill, being payable at Paris, was a foreign bill, and that the *lex loci contractûs* must prevail.

That due notice of dishonour by the acceptor was parcel of the contract, by the French Law.

That it was sufficient for the

plaintiff to prove such a notice as was required by the French law. *Rothschild v. Currie.* 737

**BONA NOTABILIA.**

To a declaration in debt, on indenture, by an administrator, who made profert of letters granted by the Archbishop of Canterbury, the defendant pleaded that, at the time of the intestate's death, the indenture was "without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland," and was not then in the diocese of Canterbury, but was of the notable goods of the deceased, to be administered within the kingdom of Ireland:—*Held*, a sufficient defence, although the plea did not deny that any Irish administration had been obtained, and did not shew by what jurisdiction in Ireland the indenture ought to have been administered, and that the Court would take notice that by the words *Kingdom of Ireland* were intended that part of the United Kingdom of Great Britain and Ireland called Ireland. (N.B. Reversed on error to the Exchequer Chamber, see *2 G. & D. Hilary Vacation.*) *Whyte v. Rose.* 199

**BOND.**

See FRAUDULENT ALIENATION.

**BOROUGH.**

See BURGESS—POOR, 6—*Quo Warranto*.

*Town Councillor, Proceedings on Election of—Quo Warranto or Mandamus.*

1. On a contested election for the office of councillor of a borough, the mayor and assessors examined the votes to ascertain which candidate was elected, and pursuant to the stat. *5 & 6 Will. 4, c. 76, s. 35*, the mayor, before two o'clock of

the day next but one following the election, published the name of the candidate elected. After that time a further examination was made, and the mayor published the name of another candidate as the one elected:—*Held*, that the act done after two o'clock by the mayor and assessors was a nullity, and the tender of his vote as a councillor by the candidate first named having been rejected by the council, that he was entitled to a mandamus to compel the council to receive it, and that in such a case mandamus is the proper remedy, and not *quo warranto*. *Reg. v. Mayor &c. of Leeds.* 832

*Compensation to Borough Officer, who had not made the Declaration required by 9 Geo. 4, c. 17.*

2. In the year 1833, H. was elected town clerk to the corporation of C. *quandiu bene se gesserit*. He remained in office up to the 1st Jan. 1836, but neglected to make the declaration required by 9 Geo. 4, c. 17. On the 1st Jan. the new town council of C. removed him from his office, under the provisions of the Municipal Corporation Act:—*Held*, that he was entitled to compensation under the 68th section. *Reg. v. Mayor &c. of Cambridge.* 294

**BREACH OF COVENANT FOR QUIET ENJOYMENT.**

See EVIDENCE, 3.

**BREACH OF PEACE.**

See PEACE, ARTICLES OF THE.

**BROKER.**

A declaration in case stated that the plaintiff employed the defendant as a broker to sell certain goods, and to deliver the same according to the terms of the contracts of sale,

to such persons as should become the purchasers thereof. That defendant as such broker made a contract between the plaintiff and a purchaser for the sale of such goods, to be paid for on delivery to the purchaser, less  $2\frac{1}{2}$  per cent. That in pursuance of the contract the plaintiff consigned the said goods to the defendant to be delivered by him to the said purchaser, upon the price being paid on delivery, less  $2\frac{1}{2}$  per cent. That thereupon it became the defendant's duty as such broker to take care that the goods should not be delivered to the purchaser or any other person without being paid for. Yet the defendant contriving &c., did not use reasonable care in that behalf, in consequence of which the goods were delivered to other persons than the purchaser without payment, by reason whereof, the purchaser having become bankrupt, the plaintiff had lost the price of the goods.

*Held*, that the declaration alleged the duty of keeping the goods until payment to result from the defendant's character as broker, that no such duty did result from that character, and that the declaration was bad after verdict. (Reversed on error, see 2 G. & D. Trinity Vacation, 1842.) *Boorman v. Brown*. 401

### BURGESS LIST.

The mere omission, whether wilful or not, to sign the burgess list, under 5 & 6 Will. 4, c. 76, s. 15, subjects an overseer to the penalty under section 48.

A declaration in debt against an overseer for such a penalty stated that it was the duty of the defendant, and of the other overseers of the parish, to make out and sign the burgess list; that the defendant, as such overseer, ought to have signed, but that the defendant did

not make out and sign such list. Plea, not guilty "by statute."

On motion in arrest of judgment, on the ground that signature by the majority of overseers would be sufficient, as being virtually the signature of all, and ought, therefore, to have been negatived by the declaration, *held*, that the defect, if any, was cured by the verdict, because, if the signature of the majority would have been the signature of all, it had been negatived by the verdict, which found that the defendant had not signed.

*Semble*, per Patteson J., that all the overseers must sign the burgess list; and that where the parish consists of several divisions, and has an overseer acting separately for each division, the statute is not satisfied by each overseer signing a separate list for his own division only. *King v. Burrell*. 207

### BURIAL.

Overseers are not bound, either by common law or the 43 Eliz. c. 2, to bury a pauper settled in their parish, who dies in the parish, but not in any parish house. *Reg. v. Stewart*. 349

### CALENDAR MONTHS.

See POOR, 11.

### CALLS.

Action for. See MANDAMUS, 2 — RAILWAY COMPANY, 2.

### CA. SA.

See TESTATUM WRIT.

### CASE.

See NEGLIGENCE.

An action on the case lies for distraining for more rent than is due, although the distress taken is not sufficient to pay the rent due.

Such an action lies, although a

notice of distress for more rent than is due is withdrawn, and the distress is sold under a second notice of distress for the rent really due. *Taylor v. Henniker.* 242

### CERTIFICATE.

Of dismissal of charge of assault. See ASSAULT.

### CERTIORARI.

See PEACE, ARTICLES OF THE.

Notice to magistrates of an intention to apply for a certiorari to remove an order of sessions, pursuant to 13 Geo. 2, c. 18, s. 5, should set forth distinctly who the parties are applying for the writ.

The affidavit of service of the notice ought to shew that the magistrates served were those by whom the order was made, and it is not sufficient that from other affidavits it may be collected that the magistrates who made the order and those served had the same names.

The sufficiency of the notice is still open to objection, although the rule for a certiorari has been enlarged by consent, and the justices have appeared to shew cause. *Reg. v. How.* 320

### CHURCH.

See CHURCH RATE—CHURCHWARDENS—DEAN AND CHAPTER—ELECTION—POOR, 7—PROHIBITION—VESTRY.

### CHURCH RATE.

See PROHIBITION—POOR, 4.

#### *Notice of Church Rate.*

Where a parish has several districts, each having its own chapel and separately maintaining its own poor, notice on the chapel door of that district alone for which the poor rate is made, is sufficient publication within 1 Will. 4 & 1 Vict.

c. 45, s. 2. *Reg. v. Justices of Worcestershire.* 440

### CHURCHWARDENS.

See PARISH PROPERTY, 1—VESTRY, 3.

*Power of Churchwardens alone to make Church Rate.*

The churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed at a vestry meeting duly convened, and has been refused by a majority of the parishioners there assembled, have no power of their own sole authority, at a subsequent time, to make such a rate.

If a rate be so made by the churchwardens alone, and a libel in the ecclesiastical court to enforce its payment by a parishioner is admitted to proof, a prohibition will be awarded.

Judgment affirmed, on error, by the Exchequer Chamber. *Burder v. Veley.* 452

### CITATION.

Of party out of his diocese. See PROHIBITION, 1.

### COGNOVIT.

A cognovit in ejectment is within the provisions of 1 & 2 Vict. c. 110, s. 9. *Doe d. Rees v. Howell.* 361

### COMMITMENT.

Warrant of. See CONSTABLE.

### COMPENSATION.

To borough officer. See BOROUGH, 2.

### COMPUTATION.

Of time. See EXCISE—POOR, 11—WARRANT OF ATTORNEY.

### CONDITIONS OF SALE.

To explain deed of conveyance. See EVIDENCE, 8.

## CONFLICT OF LAWS.

See BILL OF EXCHANGE, 4.

## CONSIDERATION.

In assumpsit. See GUARANTEE—  
VARIANCE.

## CONSTABLE.

*Justification of Constable under Warrant of Commitment—Copy of Warrant shewn to Prisoner.*

The defendant, a constable, justified the assault and imprisonment of the plaintiff under a magistrate's warrant of commitment. It was objected to this warrant that it erroneously recited, that the plaintiff was then present to hear the complaint against him, although he was in another county, and that on the indorsement of it for execution by a magistrate of the county where the plaintiff was, it did not appear that the handwriting of the committing magistrate had been proved according to 24 Geo. 2, c. 55, s. 1:—*Held*, that, if these objections to the warrant were tenable, they shewed "defect of jurisdiction" in the magistrates, but did not deprive the constable of the protection given him by the warrant under 24 Geo. 2, c. 44, s. 6.

The defendant, a constable, who had taken the plaintiff to gaol, under a magistrate's warrant, was called upon, under 24 Geo. 2, c. 44, s. 6, for a copy of the warrant and perusal of the original. The defendant gave the plaintiff a copy, but was unable to grant a perusal of the original, because it was retained by the gaoler for his own protection. The plaintiff, on information of this circumstance, made no objection to its non-production:—*Held*, that he had dispensed with the production of the original.

A constable, who is conveying a party to prison under a magistrate's

warrant, under 49 Geo. 3, c. 68, for non-payment of a certain sum, under an order of filiation and maintenance, is not bound to discharge his prisoner on tender of that sum. *Attins v. Kilby*. 145

## CONTINGENT INTEREST.

Insufficient to support action for waste. See WASTE.

What passes under Insolvent Act. See INSOLVENT, 1.

## CONTINUANCE OF LIFE.

Averment of in pleading. See PLEADING, 1—POWER OF APPOINTMENT.

## CONTRACT.

See AGREEMENT.

Notice of dishonour, a condition and parcel of the indorser's contract. See BILL OF EXCHANGE, 4.

## CONTUMACY.

De contumace capiendo. See PROHIBITION, 2.

## CONVICTION.

Excise conviction. See EXCISE.

For misapplying parish property. See PARISH PROPERTY, 2.

*Jurisdiction of Magistrates to convict for Offences committed on the High Seas.*

Under the statute 3 & 4 Will. 4, c. 53, and 4 & 5 Will. 4, c. 13, those justices alone have jurisdiction over offences committed on the high seas, who have jurisdiction over "the places on land," into which the person committing such offence, &c. "shall be taken, brought or carried, or in which such person shall be found."

Notwithstanding the provisions, in these statutes, that proceedings shall be in the form or to the effect of the forms in the schedules, pro-

... proceedings are defective which state an offence on the high seas, and do not shew the facts which in such cases will give the justices jurisdiction.

And if to a habeas corpus a warrant so defective be returned, and it does not appear there is a conviction supplying the defect, a prisoner committed under such warrant will be entitled to his discharge. *In the matter of Peckless.* 528

### COPARCENERS.

See ESTATE, 1.

### COPYHOLD.

*Custom for eldest Sister to take—Seisin.*

1. Where the custom of a manor is that the customary tenements are held to the tenants and their heirs, and that, when a tenant died seised leaving sisters only, the eldest sister should take in exclusion of the other sisters; and that the heir of an eldest sister, who should die in the life time of such tenant, should take in exclusion of the younger sisters surviving the tenant, there, if the heir of a tenant, who has been admitted and has died seised, take possession, but die without having been admitted he nevertheless dies seised, so as to let in the custom.

But such heir, although he has taken possession, does not die seised, unless he has been admitted, where the customary tenement is held not to the tenant and his heirs, but during the joint lives of the tenant and the lord, with a tenant-right of renewal, binding the lord to admit the customary heir of a tenant. It makes no difference, in this respect, that, by the custom, the customary tenements are devisable. *Doe d. Hamilton v. Clift.* 579

*Evidence of Title.*

2. In ejectment for copyholds, the court rolls of the manor, containing

an entry of a prohibition by the homage of a surrender to the plaintiff out of Court, and of his admittance, are evidence of his title against the alleged surrenderor. *Doe d. Garrod v. Otley.* 275

*Royal Manor.*

3. A mandamus to admit must not be directed to the steward only. The lord must be joined.

A mandamus will not lie to compel the admission of a customary tenant to a royal manor.

The queen still remains lady of the royal manors, notwithstanding 10 Geo. 4; c. 58, whereby certain powers over crown lands are conferred on the commissioners of woods and forests. *Reg. v. Powell.* 719

### CORPORATION.

See BOROUGH—BURGH—LAW—MANOR—TOWN.

### COSTS.

See BASTARDY, 2, 3—HUSBAND, 1.

*Security for Costs.*

1. The plaintiff, before action brought, had assigned his property to trustees, in trust for the benefit of his creditors, and had also become both insolvent and bankrupt. The trustees brought an action in his name:—*Held*, that the defendant was entitled to security for costs. *Elliot v. Kendrick.* 306

*Costs on Part of Declaration.*

2. A declaration in case for a malicious prosecution for perjury in one count set out ten assignments of perjury, which were alleged to have been prosecuted maliciously and without probable cause; at the trial the plaintiff failed in proving want of probable cause as to nine of the assignments. He obtained a verdict with damages on the tenth assignment:—*Held*, that he was not entitled to the costs of witnesses

called to give evidence of want of probable cause as to those nine; and that the defendant was not entitled to the costs of witnesses subpoenaed by him to shew probable cause as to those assignments. *Delisser v. Towne.* 644

*Taxation postponed, when.*

3. An order was made that the plaintiff, who refused to admit certain documents, should pay the costs of proving them, if they should be proved to the satisfaction of the judge at the trial. The judge certified that they had been so proved. The plaintiff was nonsuited, but obtained a rule nisi for a new trial. The Court refused to direct the master to tax the costs of proving the documents before the rule for a new trial had been disposed of. *Doc d. Davies v. Davies.* 141

### COVENANT.

See EVIDENCE, 5—LANDLORD AND TENANT, 1—LIMITATIONS, STATUTES OF, 1—PLEADING, 3.

### CRIMINAL LAW.

See AMENDMENT, 2—ASSAULT—EVIDENCE, 10—HABEAS CORPUS—INDICTMENT.

### CROWN OFFICE.

Mode of suing out habeas corpus ad subjiciendum. See HABEAS CORPUS.

### CUSTOMS AND EXCISE.

See EXCISE—HABEAS CORPUS.

### DAMAGES.

Right of action, where no damage sustained. See CASE—AGREEMENT.

Direction to jury, *real* or nominal damages. See AGREEMENT.

### DAMAGE FEASANT.

See DISTRESS.

### DAMNUM.

*Injuria sine damno.* See CASE.

### DATE.

*Similiter* good, without date. See SIMILITER.

### DEAN AND CHAPTER.

The deanery of Exeter was founded and endowed by the bishop of that see in 1225; the dean to be elected freely by the chapter from among the prebendaries. For more than 300 years from the foundation, the course pursued at the election of dean was for the bishop to issue his license to the chapter to elect, for the chapter to elect and present to the bishop, and for the bishop to confirm. Queen *Eliz.* issued letters recommendatory, on a vacancy occurring in 1559, and the person recommended by her was elected by the chapter, and all the formalities of previous elections were observed. *Charles* 2, and succeeding monarchs down to 1839, granted the deanery as it became vacant by letters patent and as of full right, but the same formalities were always observed, the bishop issuing his license, the chapter electing, and then the bishop confirming.

In 1839 the crown issued letters patent granting the deanery, to which the chapter paid no attention. The crown afterwards issued letters recommendatory in favour of the same person who was grantee under the letters patent, but the chapter elected another person.

A rule for a mandamus to elect the person recommended by the crown was discharged, on the grounds, that the crown had not the right, which it appeared to



claim, of recommending a person whom the chapter would be bound to elect, so that the election of any other would be void; and that, on the other hand, if the deanery were donative in the crown, it would pass by letters patent, and the person elected by the chapter would be a mere trespasser; that, if it were in the presentation of the crown as patron, or the crown had a right to nominate a person to the chapter to be by them presented to the bishop for institution, the proper remedy was *quare impedit*. *Reg. v. President and Chapter of St. Peter's, Exeter.* 252

### DEBT.

On covenant. See LIMITATIONS, STATUTES OF, 1.

### DECLARATION.

Borough officer, who had neglected to make the declaration under 9 Geo. 4, c. 17, entitled to compensation under 5 & 6 Will. 4, c. 76, on removal.

### DE CONTUMACE CAPIENDO.

See PROHIBITION, 2.

### DEED.

Of conveyance, not to be explained by conditions of sale. See EVIDENCE, 8.

Stamp on. See STAMP, 2.

### DEFAMATION.

Criminal information, as to proof of publication. See EVIDENCE, 10.

#### *Privileged Communication.*

1. In an action for libel, it appeared that the plaintiff was churchwarden and the defendant clergyman of the same parish, and that, differences having arisen between them in that relation, the plaintiff requested that

the defendant's future communications should be by letter to the plaintiff's clerk. The defendant afterwards applied, by letter to the clerk, for money which he conceived to be due to himself from the plaintiff. The clerk answered that the plaintiff denied his liability, and in reply the defendant addressed a letter to the clerk, saying, "This attempt to defraud me is as mean as dishonest."

*Held*, that it was properly left to the jury whether the above language was justified by the occasion, and that the communication was not in itself privileged so as to render proof of actual malice necessary to sustain the action. *Fuson v. Evans.* 286

2. In case for libel, the declaration stated that the plaintiff was a Roman Catholic priest and clergyman to a chapel at M., and that defendant, intending to injure him in his office of such priest and clergyman, falsely and maliciously published concerning the plaintiff in his said offices of clergyman and priest, the alleged libel. The libel was contained in a document, which the defendant read at a public meeting, convened to petition parliament against the usual grant to the Roman Catholic college at Maynooth. The defendant introduced the reading of the document by saying that he would give a specimen of what the Catholic priests, indoctrinated at Maynooth, teach the poor Roman Catholics attending them in reference to the way of salvation, how they grind them down and debase them almost as low as the beast that perisheth. He then read the document, which purported to have been furnished by a policeman, and to give an account of a man whom the policeman had seen at M. crawling on his hands and knees in a public street, and that the



man had said that he was performing penance, and that the plaintiff, his priest, would not administer the sacrament to him until he had performed such penance.

Judgment arrested, because, even assuming that the libel charged that the plaintiff had refused the sacrament under the circumstances stated, and that it did not merely describe the penitent's apprehension of the plaintiff's displeasure, still the declaration did not inform the Court of the duties of a Roman Catholic priest in imposing penance, and therefore failed in shewing that the plaintiff's character would suffer from the imputation.

*Held*, that if the publication had been libellous, it would not have been privileged by the occasion. *Hearne v. Stowell*. 696

See also *DEVISE*.

Parol evidence to explain devise. See *EVIDENCE*, 7.

*Fee Simple, or Life Estate.*

A testatrix, owner in fee, (before stat. 7 Will. 4 and 1 Vict. c. 26), devised to C. L. (her eldest son) as follows:—"An estate called L. in the parish of B." for life: "and after his death I give and bequeath the same unto his son T. L. free of legacies and mortgages." There was a residuary clause in favour of C. L. who was appointed executor; *Held*, that T. L. took an estate for life only. *Doe d. Loan v. Loan*. 662

See also *DISSEISIN*.

See *ERRATA*, 1.

See *DISTRESS*.

Case for distressing for more rent than due, though distress insufficient to pay the rent due. See *CASE*.

Appraisement. See *APPRAISEMENT*.

Tender of rent after distress impounded. See *LANDLORD AND TENANT*, 2.

Whether tenancy to be inferred after distress for rent under power, in mortgage deed. See *MORTGAGE*.

*Damage Feasant.*

Cattle or goods in the actual use of a party cannot be distrained damage feasant. *Field v. Adams*. 604

See *DONATIVE*.

See *DEAN AND CHAPTER*.

## ECCLESIASTICAL LAW.

See *CHURCH RATE*—*CHURCHWARDENS*—*DEAN AND CHAPTER*—*ELECTION*—*POOR*, 7—*PROHIBITION*—*VISITATION*.

See *EJECTMENT*.

See *COMMONS*—*BEAUFORT*, 1—*LANDLORD AND TENANT*, 1—*MORTGAGE*—*NEW TITHE*, 2—*FARMER*—*PROCEEDINGS*.

*New Rule as to Proceedings in Ejectment.*

It is ordered, that a party entitled to appear to a declaration in ejectment may appear and plead thereto at any time after service of such declaration and before the end of the fourth day of the term, in which the tenant is required by the notice to appear, in town causes; and before the end of the fourth day after the term, in which the tenant is required to appear, in country causes: and may proceed to compel the plaintiff to reply thereto, or may sign judgment of non pros. notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration: and that a plaintiff, who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice shall be entitled, on

production of such plea, to an order of a judge for leave to draw up a rule for judgment as of the time at which such rule for judgment would have been obtained.

522

*Messe Profus.*

In ejectment by landlord against tenant, the plaintiff may give evidence of mesne profits, under 1 Geo. 4, c. 87, s. 2, although he has not given notice of trial. *Doc d. Thompson v. Hodgson.* 142

||| ELECTION. |||

See *Bonour*, 1—*DAN AND CHARTER—VISITOR.*

In pursuance of an act 13 Ed. the Earl of Leicester, by deed, founded an eleemosynary hospital, and made it a corporation by the name of the "Master and Brethren of the Hospital of" &c. By ordinances for the constitution and government of it, he fixed the number of the brethren, who were to be chosen by preference from poor persons disabled in the wars. The appointment of master he vested in his heirs, directing them however to appoint, if fit, the vicar of a neighbouring church. By deed he gave to the master and brethren to hold to their use and their successors for ever lands and possessions, amongst which was the advowson of a vicarage. By several ordinances he vested the government and control of the brethren in the master.

*Held*, that the master had no veto on the election of a presentee to the vicarage by the majority, and that his concurrence was not necessary to the validity of an election by the majority.

*Quare*, whether, if that had been made necessary by the founder, such a provision would not have been void by stat. 35 Hen. 8, c.

27, he not having been expressly authorized by the stat. Ed. to make such a term in the deed of incorporation.

A writ of mandamus stated the election of a presentee by a majority of the brethren, and commanded the master, who had refused to affix the seal to an appointment, to do so. *Held*, that an allegation in the writ was sufficient as to his power to affix the seal, which stated that he had the custody of one of the keys of the chest in which it was kept, and had positively refused to affix the seal, and claimed a right to withhold it.

The return set out the several instruments constituting the society, to lead to an inference that the master had a veto, and stated, as a fact, that the master had always concurred in former elections. *Held*, that this mode of setting up a right to a veto was evasive, argumentative and uncertain.

*Held*, that it was not necessary to tender to the master a deed of presentment for sealing, as the act was of so simple a nature that there could be no question about the terms of the deed, and the master had refused to seal any presentment.

*Held*, that, if the body had a right to revoke the appointment, revocation was matter of return, and need not be negatived by anticipation in the writ.

*Held*, that, the presentment, being a right claimed by a stranger, the decision on the claim was not for the visitor.

*Held*, finally, that the writ, being merely to affix the seal, might properly go to the master alone. *Reg. v. Kendall.* 303

ENTRY.

To avoid fines. See *Estates*, 1.

**ERROR, WRIT OF.**

In debt for several penalties, it was agreed at the trial that the plaintiff should recover a verdict for one penalty only, and that the others should be given up:—*Held*, that the agreement prevented the defendant from bringing a writ of error, *Apothecaries' Company v. Harrison*. 292

**ESTATE.**

See COPYHOLD, 1—DEVISE—POWER OF APPOINTMENT—PROPRIETORS—WASTE.

*Coparceners—Disseisin—Entry to avoid Fines—Waiver.*

1. Testator, in 1804, devised his real property to his brother-in-law, *Wm. P.*, but at that time had no interest in the land in question.

In 1814 he purchased the land, on which occasion the residue of an outstanding term of 500 years, created in 1793, was assigned to *Wm. P.*, in trust for the testator, to attend the inheritance. The testator died in 1820, when the fee simple descended, as to one moiety, to the testator's four nieces, and, as to the other, to his sister, the wife of *Wm. P.*

*Wm. P.* and his wife shortly afterwards entered into possession of the whole of the premises, and received the rents, without accounting to the co-parceners; and in 1828 *Wm. P.* and his wife executed a feoffment, with livery of seisin, and afterwards a fine sur cognisance de droit come ceo was levied *with proclamation*, in which the feoffee was plaintiff and the feoffors defendants. At the time of the testator's death and of the fine, his nieces were under coverture. *Wm. P.* died in 1828, having continued in sole possession. By his will he devised to the defendant, but made no mention therein of the term. The defendant entered,

and continued in possession to the time of the ejectment brought against him in 1838. In 1837 the wife of *Wm. P.* died, and in the same year administration de bonis non of *Wm. P.* was granted to *Sam. B.*, the husband of one of the coparceners.

In 1836 one of the coparceners died, leaving her husband her surviving, and in 1837 the husband of another coparcener died.

The declaration in ejectment contained a count on a joint demise by the widow coparcener, the husband of the coparcener deceased, and the other two coparceners and their husbands; and also a count on a demise by *Sam. B.*, the administrator de bonis non of *Wm. P.*

Just before ejectment brought, *Sam. B.* made an actual entry on the premises, demanding them on behalf of himself and the other lessors of the plaintiff in the first count, and stating that he entered to avoid all fines.

*Held*, that by the feoffment and fine with proclamation there had been an absolute disseisin of the coparceners, and not a disseisin at election, and that an entry within five years was necessary to avoid the fine.

That the entry was too late as to the two husbands, and being too late as to them, was too late as to their wives, the coparceners also, during coverture, although they would have five years to enter after discoverture.

That, the joint demise being therefore bad as to the husbands, it could not be supported as to the other parties.

That the fine and feoffment of the termor had caused a forfeiture of the term, and entitled the freeholder to enter within five years.

That the freeholder might, however, waive the forfeiture, and enter

within five years after the expiration of the term.

That, as the freeholder might waive the forfeiture of the term, he might treat it as still subsisting for another purpose, and acquire it for his own benefit.

That therefore *Sam. B.*, who had acquired the term as administrator de bonis non of the termor, might set it up for his own benefit, and that the count on his single demise was good.

That, though the lessors of the plaintiff were beneficially entitled to a moiety only of the land, the verdict must, in point of form, be entered for the whole, as the term could not be divided. *Doe d. Blight v. Pett.* 278

*Power of Appointment—Rule in Shelley's Case.*

2. Admitted that an appointment in favour of children, with remainder to grandchildren, under a power to appoint to children, is void for the excess only.

Under the same instrument an estate for life was given to *D. T.*, remainder to *K. T.* for life, remainder to *D. T.* and the heirs of his body.

*Quære*, whether the rule in *Shelley's* case applies to such a case, the remainder not being to the heirs of the body of the tenant for life, but to him and such heirs.

*Held*, that at all events *D. T.* has no power to bar the intermediate estate for life to *K. T.* *Doe d. Nicholson v. Welford.* 77

## EVIDENCE.

Under particular issues. See PLEADING, 2, 3, 4.

*Process to compel Attendance of Witness at the Assizes.*

1. A magistrate has no right to issue a warrant for the apprehension of a person to attend to find bail for

his appearance as a witness at the assizes, although it is sworn that the witness is material and has refused to obey a summons, which had previously issued, to give evidence before the magistrate.

*Quære*, whether a magistrate can, after a summons to give evidence before him has been disobeyed, issue a warrant to compel the witness's attendance. *Evans v. Rees.* 32

*Incompetency of Witness.*

2. Trespass q. c. f., and for taking plaintiff's goods.

Plea: that *W.* was tenant of the premises to the defendants, at a rent of 10*l.*, and that they distrained, &c.

Replication: Non tenuit.

The plaintiff's case at the trial was, that *W.* was owner in fee and had let to him at a rent of 8*l.*

*Held*, that *W.* was not competent to prove this case, because he would be liable over to the plaintiff if he lost the verdict, and that the ground of incompetency was an interest in the result, and not merely in the verdict as an instrument of evidence. *Wedgewood v. Hartley.* 84

*Effect of Non-compliance with Notice to produce.*

3. Where a party served with notice to produce, refuses to produce the document when called for at the trial, and secondary evidence has been given of its contents, he cannot afterwards produce the document as his own evidence. *Doe d. Thompson v. Hodgson.* 142

*Proof of Execution of Instrument produced by opposite Party.*

4. In an action of assumpsit the defence was, that the plaintiff's testator and the defendant were partners, and that the subject-matter of the action was a partnership account.

To prove the partnership the defendant called for the production of an agreement, purporting to be made by a third person, K., with the plaintiff's testator and defendant as a firm, to do certain work for them:—*Held*, that on the production of it by the plaintiff the defendant was not entitled to read it without proof of its execution. *Collins v. Bayntun.* 544

*Admission by one Executor, how far binding on Co-Executor.*

5. A declaration in covenant, against executors for a breach of covenant for quiet enjoyment of an estate for life against all having lawful title from the testator, alleged that the defendants having lawful title entered. The plea traversed that the covenant of testator was broken during the continuance of the said term:—*Held*, that, although the plea was demurrable for making such a general traverse, yet, as the declaration was also bad, for not alleging that the defendant entered, having lawful title from the testator, it must be taken that the plaintiff had alleged a sufficient breach in his declaration, and that the averment of lawful title meant *meane* title derived from the testator, and, that this being so, the plea put the title in issue.

To shew the lawful title of the defendants, the plaintiff proved that they had taken possession of the estate, and also proved admissions by one of them, that they held it under a deed of gift from the testator prior to the covenant declared upon:—*Held*, that, as the allegation that the defendants having lawful title entered was not divisible, plaintiff was bound to prove a joint title in the defendants, and that the admission by one, as to their holding over under the deed of gift, was not evidence against the other:—*Held*, also,

that, although the admission was made by one of two co-executors, it was not made by him *quâ* executor, and therefore did not admit a breach of covenant by the testator.

*Quære*, whether, if the admission of the deed of gift had been made by a sole defendant, this would have dispensed with further proof of the deed. *For v. Waters.* 1

*Admission by Payment into Court.*

6. Payment of money into Court to *indebitatus* counts is not an admission of any liability *ultra* the sum paid in, however special the particulars of demand may be. *Stevenson v. The Mayor, &c. of Berwick.* 546

*Parol Evidence to explain Devise.*

7. Devise to J. A. the grandson of my brother in fee, charged with 100*l.* to each and every of the brothers and sisters of J. A.

After it had been shewn that the brother of the testatrix had two grandsons named J. A., the one with several brothers and sisters, and the other with only two brothers and one sister—*Held*, that evidence was admissible of a declaration by the testatrix, some months after making her will, that she had devised the property in question to the J. A. who had only two brothers and one sister. *Doc d. Allen v. Allen.* 220

And see *post*, 9.

*To explain Deed.*

8. Where a deed purported to convey a messuage with the appurtenances, purchased at an auction, it was held that neither the conditions of sale at the auction, signed by the purchaser, nor his own declarations as to the extent of his purchase, were admissible in evidence, to shew that a garden which had

been usually enjoyed with the mes-  
suages was expressly excepted  
from the sale. *Doe d. Norton and  
Wheeler v. Webster.* 270

*Custody of ancient Documents.*

9. On a devise to *M. B.*, widow, for  
life, and her three daughters, *Mary*,  
*Elizabeth* and *Ann*, in fee, an ille-  
gitimate daughter, named *Elizabeth*,  
claimed as being the only *Elizabeth*  
answering the description at the  
time of the will being made, a le-  
gitimate daughter *Elizabeth* having  
been dead six years previously:—  
*Held*, that parol evidence was ad-  
missible to shew that the testator  
intended his legitimate daughter as  
devisee, and that he did not know  
of her death.

Letters more than thirty years'  
old, produced from the proper  
custody, prove themselves.

The defendant produced letters  
thirty years' old, purporting to be  
addressed to her mother, and  
proved that she was living with  
her mother at the time of her  
death, when her papers and keys  
were given up to her:—*Held*, that  
the custody was proper. *Doe d.  
Thomas v. Beynon.* 193

*Evidence on which Rule to be drawn  
up for Criminal Information against  
Publisher of Newspaper.*

10. A rule for a criminal information  
against the publishers of a newspa-  
per libel must be drawn up on  
reading the newspaper, and the  
newspaper must be filed; other-  
wise the Court will discharge such  
a rule, although properly granted  
on production of a certified copy  
from the stamp office, under 6 &  
7 *Will.* 4, c. 76, s. 8, of a declara-  
tion by the defendant that he is  
publisher of a newspaper therein  
described, and on production of a  
newspaper corresponding to it,  
which contains the libel. *Reg. v.  
Woolmer and another.* 137

VOL. IV.

Evidence of account stated. See AC-  
COUNT STATED.

Of act of bankruptcy. See BANK-  
RUPTCY.

Of notice of dishonour. See BILL OF  
EXCHANGE, 3.

Of surrender of copyhold. See CO-  
PYHOLD, 2.

When evidence may be given of mesne  
profits. See EJECTMENT.

Of acceptance of goods. See FRAUDS,  
STATUTE OF.

Of acknowledgment of part payment.  
See LIMITATIONS, STATUTES OF, 2.

EXCESS.

In execution of power of appoint-  
ment. See ESTATE, 2.

EXCISE.

Where it appeared, on the face of a  
conviction for an offence against  
the excise laws, that the plaintiff  
had been summoned on the 20th  
September to appear before the  
defendant on the 30th September;  
and, the plaintiff not appearing on  
that day, that the defendant pro-  
ceeded to hear evidence, and con-  
victed him in a penalty of 5*l.*, the  
Court held the conviction to be  
null and void, and the defendant  
liable in trespass for issuing a dis-  
tress warrant, as the excise act (4  
& 5 *Will.* 4, c. 51, s. 19) requires  
that "ten days notice at least"  
shall be given to the party to ap-  
pear, and the rule is inflexible to  
construe such limitation of time as  
ten clear days. *Mitchell v. Foster.*  
150

EXECUTION.

See ARBITRATION, 1—ATTORNEY—  
BANKING COMPANY—PROCESS—  
TESTATUM WRIT.

An execution by writ of fi. fa.,  
founded on a judgment upon a  
warrant of attorney, may be ap-  
portioned so as to entitle the plain-  
tiff to the proceeds of any money

3 D

actually in the hands of the sheriff, though before the writ be completely satisfied a vesting order under the Insolvent Act is made, which prevents any further execution of the writ in favour of such judgment creditor, under the stat. 1 & 2 Vict. c. 110, s. 61.

In such a case the plaintiff becomes entitled to money seized by the sheriff in specie, as much as if it were money realized for goods seized and sold under the writ. *Squire v. Huetson.* 633

### EXECUTION OF POWER OF APPOINTMENT.

See ESTATE, 2—POWER OF APPOINTMENT.

### EXECUTOR.

See BONA NOTABILIA.

As to admission by co-executor. See EVIDENCE, 5.

### FALSE RETURN.

Where, after a return, to a fi. fa., that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. *Holmes v. Clifton.* 112

### FEE.

Fee or estate for life. See DEVISE. Whether "proprietor" in local act means owner in fee simple. See PROPRIETORS.

### FEOFFMENT.

Disseisin by. See ESTATE, 1.

### FI. FA.

See EXECUTION—FALSE RETURN—TESTATUM WRIT.

### FINES.

Entry to avoid. See ESTATE, 1.

### FISHING.

See OYSTER SPAT.

### FOREIGN LAW.

See BILL OF EXCHANGE, 4.

### FORFEITURE.

See ESTATE, 1.

### "FORTHWITH."

When certificate by justices that a charge of assault has been dismissed, is not given "forthwith." See ASSAULT.

### FRAUDS, STATUTE OF.

*Acceptance of Goods sold.*

Where one person being in possession of goods belonging to another agrees by parol to become the purchaser of them, his subsequent acts may amount to proof of an acceptance, so as to satisfy the Statute of Frauds.

The plaintiff was the owner of some goods lying in bond, and entered in the name of the defendant, a custom-house agent. The plaintiff, being indebted to the defendant, gave him a written authority to sell the goods, and pay himself out of the proceeds. The defendant, not having sold them, subsequently agreed by parol to purchase them, and he then sold them, and credited the plaintiff with their value:—*Held*, that this was evidence of an acceptance of the goods by defendant. *Edan v. Dudfield.* 656

*W.*, as agent for the defendant, had occasionally employed *B.* to purchase wools, which purchases had been ratified by defendant. In June, 1839, defendant wrote to *B.* to say he would have nothing to



do with any purchases made by him. This letter, it appeared, had been communicated to the plaintiff, but at what time was left uncertain. In July, *B.* bought wools of plaintiff, then lying at his premises, and they were sent to a warehouse of another person, where they were weighed and packed by *B.* (together with other wools) in sheets, which defendant was in the habit of sending there for the purpose of packing such wools. The wools in question were not paid for, and it was the course of dealing that wools were not to be removed from such warehouse till payment. In an action to recover the price of the wools,

*Held*, 1. That there was sufficient evidence to warrant the jury in finding that *B.* was the defendant's agent for the purchase, and that the plaintiff had not had notice of the countermand of his authority. 2. That there was a sufficient acceptance of the wool on behalf of the defendant within the Statute of Frauds. *Dodsley v. Varley.* 448

### FRAUDULENT ALIENATION.

A bond is not "goods" or "chattels" within 13 *Eliz.* c. 5, as to fraudulent alienation. *Sims v. Thomas.*

233

### FRAUDULENT REMOVAL.

See PLEADING, 5.

### FRENCH LAW.

See BILL OF EXCHANGE, 4.

### GARDEN.

Passes under word "appurtenances."  
See EVIDENCE, 8.

### GOOD FAITH.

Writ of error brought in violation of. See ERROR, WRIT OF.

### GOODS AND CHATTELS.

Whether bond is. See FRAUDULENT ALIENATION—GOODS, WARES AND MERCHANDISE.

### GOODS, WARES AND MERCHANDISE.

Under an act for making navigable the river Ouse, a toll of 4*d.* was imposed on every ton of coals, cinders, lime and limestone, stone, gravel and manure, carried on the river; and for every ton of butter or other goods, wares and merchandise and commodities, a toll of 9*d.*:—*Held*, that blocks of stone, cut to a certain size and shape, for railway sleepers, were not subject to the higher toll. *Fisher v. Lee.*

447

### GUARANTEE.

Declaration in assumpsit stated that defendant made the promise declared upon in consideration that plaintiffs, at his request, would give up to him a certain guarantee by him to pay 10,000*l.* for Messrs. *L.*, then *held* by plaintiffs. Averment, that plaintiffs did give up the guarantee, and that defendant did not perform his promise. Plea, that the guarantee so given up was a promise to answer for the debt of another; that there was no memorandum thereof wherein any sufficient consideration was stated; that the guarantee was in the following form:—"Messrs. *H.* (the plaintiffs)—In consideration of your being in advance to *L.* in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. *J. B.*"

*Held*, 1, That the words "being in advance" did not necessarily imply a *past* advance, and that, as the guarantee might be construed to relate to prospective advances, the giving it up was a good consideration.



2. That, even if the guarantee did relate to past advances, so as to be worthless as a pecuniary consideration, yet the mere giving up of the instrument was a good legal consideration; *Maule J. dubitante*, whether the pleadings shewed that the instrument itself had been given up, or whether they shewed only that the contract supposed to be contained therein had been given up. *Brooks v. Haigh.* 288

### HABEAS CORPUS.

See PEACE, ARTICLES OF THE.

A writ of habeas corpus ad subjiciendum, &c. granted by a judge of the Queen's Bench, must issue from the crown side of the Court, when the prisoner is in custody for a criminal matter.

Where a prisoner committed to custody for a criminal offence sued out a writ of habeas corpus from the plea side of this Court, and obtained his discharge on the ground that the warrant of commitment was defective:—*Held*, that the solicitor for the crown, who had opposed his discharge without then objecting that the writ had irregularly issued, had thereby waived the objection, and that he could not afterwards set aside the writ for irregularity.

By 3 & 4 Will. 4, c. 53, s. 48, a person found on board a vessel liable to forfeiture is to forfeit 100*l.* By 4 & 5 Will. 4, c. 13, s. 2, imprisonment for six or nine months, with hard labour, on "conviction" is substituted for the former pecuniary penalty:—*Held*, that a party imprisoned under this act was in custody for a "criminal matter" within the meaning of 56 Geo. 3, c. 100; and that a habeas corpus ad subjiciendum, obtained on his behalf from a judge of the Queen's Bench, should issue from the crown office. *In re Easton.* 558

### HIGHWAY.

Repair. See MANDAMUS, 1.

1. Justices sued for acting in execution of their office are entitled to the following protection by 24 Geo. 2, c. 44, and 21 Jac. 1, c. 12. 1. A month's notice of action, stating the cause of action. 2. Limitation of action to six months: and 3. Double costs, if the action fails. Justices and others acting under the Highway Act, 5 & 6 Will. 4, c. 50, s. 109, are entitled to—  
 1. *Twenty-one days' notice* of action.  
 2. Limitation of action to three months.  
 3. Costs as between attorney and client:—*Held*, that this clause, giving twenty-one days' notice of action, did not repeal the clause in the previous statute, entitling justices to one month's notice. *Rix v. Borton.* 182
2. Under 55 Geo. 3, c. 68, s. 2, which enacts, that when it shall appear, upon the view of any two or more justices, that a highway is unnecessary, they may make an order to stop it up, an order stating, "We, A. and B. &c., having viewed &c., and it appearing unto us that such highway is unnecessary," does not shew that they acted upon their view, and is therefore insufficient. *Reg. v. Jones.* 520

### ILLEGALITY.

See SPIRITUOUS LIQUORS.

### INADVERTENCE.

What is cured as an inadvertence in a sale of land for redemption of land-tax. See LAND-TAX.

### INDICTMENT.

Indictment for assault. See ASSAULT.

An indictment for perjury alleged that a petition was presented to the House of Commons against the return of B. on the ground of

bribery; that shortly before his election, to wit, on the 6th July, *B.* and *C.* went to the house of defendant to solicit his vote, that at the trial of the petition it was a material question whether at the *said time* when *B.* and *C.* went to defendant's house a certain act of bribery took place; that defendant was a witness sworn to speak the truth of and concerning the said premises, and that she deposed, touching the said election and the matter of the petition, that, shortly before *B.*'s election, *B.* and *C.* came on a canvassing visit to defendant's house, and that the act of bribery then took place, (innuendo) thereby meaning that at the *said time* when *B.* and *C.* went to defendant's house as *afore-said* the act of bribery was committed.

*Held*, on motion in arrest of judgment, 1st, that the allegation that defendant deposed "touching the said election," &c. sufficiently pointed to the matter, whereupon the defendant was sworn as a witness. 2nd. That the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shewn to refer to that particular time and no other. *Reg. v. Virrier.* 161

### INFANT.

Action by, where he has contributed to the injury complained of. See NEGLIGENCE.

### INJURIA.

Sine damno. See CASE.

### INNUENDO.

See INDICTMENT.

### INSOLVENT.

Security for costs from insolvent. See COSTS.

Vesting order, before fi. fa. against insolvent is satisfied. See EXECUTION.

1. Where a party, after assigning an annuity bond to trustees for his wife and children, and in the event of the children dying without issue, in trust for himself, his executors &c., became insolvent:—*Held*, the contingency in favour of the insolvent not having happened, that his assignee, under 1 Geo. 4, c. 119, had no beneficial interest in the bond, nor, consequently, any right of action on it. *Sims v. Thomas.* 233
2. The defendant, in a mortgage to the plaintiff, covenanted to insure his life, and to pay the annual premiums on the policy, and in case of default that he would repay such sums as should be paid by the plaintiff by way of premiums. The defendant insured his life, and was afterwards discharged under the Insolvent Act:—*Held*, that the defendant was still liable, on the covenant, for premiums paid by the plaintiff after defendant's discharge. *Bennett v. Burton.* 313
3. An insolvent having been committed to prison on the 15th July, 1837, for a debt under 20*l.*, was discharged from custody by the Court on the 2nd Nov. 1838 (the first day of Michaelmas term). On the 1st Oct. 1838, the Imprisonment for Debt Act (1 & 2 Vict. c. 110) had come into operation, and on the 23rd Oct. a creditor petitioned the Insolvent Court for a vesting order under the provisions of that act; on the 26th that Court made an order, vesting the insolvent's estate in a provisional assignee; and on the 24th Nov. (after the insolvent's discharge) a second order was made, vesting the estate in the petitioning creditor:—*Held*,

that notwithstanding the discharge of the insolvent, his estate had become vested in his assignee. *Kitching v. Croft.* 339

4. Where an order has been made by the Insolvent Court under the 37th sect. of the Imprisonment for Debt Act (1 & 2 Vict. c.110), vesting the insolvent's estate in the provisional assignee, the detaining creditor is not bound to accept the amount of debt and costs tendered on behalf of the insolvent, where it does not distinctly appear that the money tendered is no part of the insolvent's estate; and the Court will not order the insolvent's discharge on affidavit of such tender and refusal. *Drury v. Houndsfield.* 386

5. A warrant of attorney had been given by an insolvent debtor to the provisional assignee, pursuant to the stat. 7 Geo. 4, c. 57, s. 57. After the death of the insolvent, by order of the Insolvent Debtors' Court, judgment was signed upon it. The Court set it aside as irregular.

The Court afterwards refused a rule to enter up judgment nunc pro tunc as of a period anterior to the death of the insolvent. *Harden v. Forsyth.* 547

### INSPECTION OF DOCUMENTS.

A railway act contained several clauses relating to inspection of the books. In an action for calls, the defendant applied for an inspection, to enable him to plead, which inspection was not directed to be given by either of the clauses. The Court refused to compel the Company to permit the inspection required. *Birmingham, Bristol and Thames Junction Railway v. White.* 649

### I. O. U.

See ACCOUNT STATED.

### IRELAND.

See BONA NOTABILIA—POOR, 10.

### IRREGULARITY.

See PROHIBITION, 1—HABEAS CORPUS.

### JOINT TENANTS.

Admission by one joint tenant. See EVIDENCE, 5.

### JUDGE.

See AMENDMENT—RESTITUTION.

### JUDGMENT.

Judgment, where facts found specially under 3 & 4 Will. 4, c. 42. See AMENDMENT, 1.

Rule of Court having the effect of a judgment, under 1 & 2 Vict. c.110. See ARBITRATION, 1—ATTORNEY.

Arrest of judgment. See DEFAMATION, 2—LANDLORD AND TENANT, 2.

### *Nunc pro tunc.*

The power of the Court to enter up judgment nunc pro tunc does not depend in any way upon 17 Car. 2, c. 8, but exists at common law, and may be exercised although the death of a party take place before the term ensuing the verdict, and although also more than two terms intervene between verdict and judgment, if the delay be not that of the party seeking to enter up judgment.

The defendant, who had obtained a verdict at the spring assizes, died before the first day of Easter term. In that term the plaintiff moved for a new trial, and the rule was refused on the last day of the term. The trial of the cause had lasted four days, and the costs were so heavy that the taxation was not complete, nor was judgment signed, until after Trinity term. In Michaelmas term following notice was given of the allowance of a writ of

error, on the ground that judgment had not been signed within two terms after verdict. In Hilary term application was made for judgment *nunc pro tunc*, and was granted, the Court considering the defendant's representatives free from laches. *Evans v. Rees.* 36  
And see **INSOLVENT**, 5.

### JUDICIAL NOTICE.

Of meaning of words "*kingdom of Ireland.*" See **BONA NOTABILIA**.

### JURAT.

See **PEACE**, **ARTICLES OF**.

### JURISDICTION.

Of Queen's Bench. See **QUEEN'S BENCH**.

Of judge. See **AMENDMENT—RESTITUTION**.

Of Ecclesiastical Courts. See **PROHIBITION**.

Of magistrates. See **MAGISTRATES—RESTITUTION—EVIDENCE, 1—EXCISE—CONVICTION**.

### JUSTICES.

See **MAGISTRATES**.

### LANDLORD AND TENANT.

Yearly tenancy. See **POOR**, 11.

Mesne profits in ejectment. See **EJECTMENT**.

Tenancy of mortgagor to mortgagee. See **MORTGAGE**.

Variance in declaration upon an agreement for demise. See **VARIANCE**.

Plea, in trespass, that the goods taken had been on premises demised by plaintiff, and fraudulently removed. See **PLEADING**, 5.

*Breach of Covenant where Tenant has entered under an Agreement for Lease.*

1. Where a party enters into possession of a farm, and pays rent under an agreement for a lease, containing

divers covenants to cultivate, pay rent &c. he is bound by all the covenants in the agreement applicable to a tenancy from year to year:—*Held*, therefore, where the agreement stipulated for the lease to contain a condition of re-entry if the tenant should grow two successive crops of white corn without fallow, that he might be ejected without notice, if he committed a breach of this covenant. *Doe d. Thomson v. Amey.* 177

### Distress.

See also **APPRAISEMENT**.

2. After a distress for rent has been impounded, tender of the rent and charges is too late.

Trespass for entering the plaintiff's dwelling-house, and continuing therein five days, and seizing the plaintiff's goods. The defendant justified, under a distress for rent, stating his entry, seizure of the goods, and impounding them on the premises. Plaintiff now assigned that, after the defendant entered, and after the plaintiff made a sufficient tender of the rent and charges, and after the defendant ought to have quitted the premises, the defendant remained in the dwelling-house, &c. Plea to the new assignment, traversing the tender. After verdict for the plaintiff, the Court arrested the judgment, on the ground that it did not appear from the pleadings that the tender was made before the goods were impounded, and that the omission was not cured by verdict. Also, per *Patteson J.* that it did appear from the pleadings that the tender was made *after* the impounding.

*Seemle*, trespass lies for a wrongful continuance in possession after a distress made, per Lord Denman C. J. *Ladd v. Thomas.* 9

### Notice to quit.

3. In ejectment to recover a farm at

H., the notice to quit described the premises to be at D., which was a distinct parish, but as it did not appear that the defendant was misled by the notice—*Held*, that it was sufficient. *Doe d. Armstrong v. Wilkinson.* 323

## LAND TAX.

### *Sale of Land to redeem Land Tax.*

Land, with timber on it, was sold and conveyed by tenant for life, without impeachment for waste, under the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 51). By sect. 98 the purchase money is required to be paid into the Bank; and by sect. 119, *after such payment*, the sale is declared valid. The purchase money for the land was so paid in, but that for the timber was paid to the tenant for life, who applied it to his own purposes:—*Semble*, such sale was invalid under sect. 119. . . .

But *Held*, that such payment was a "mistake or inadvertence" within 54 Geo. 6, c. 173, s. 12, and that the sale was made good by that act and 57 Geo. 3, c. 100, s. 25. *Doe d. Blewitt v. Phillips.* 562

## LIBEL.

See DEFAMATION—EVIDENCE, 10.

## LIEN.

Evidence of, under the general issue in trover. See PLEADING, 3.

Where chattels are deposited with a party who claims a lien on them, after notice from the bailor of the sale of the chattels to a third party, the bailee cannot as against the vendee claim a further lien in respect of a debt incurred to him by the bailor after such notice, though the chattels remain in his books in the name of the bailor. *Barry v. Longmore.* 344

## LIFE.

Estate for. See DEVISE.

Averment of continuance of life. See POWER OF APPOINTMENT—PLEADING, 1.

## LIMITATIONS, STATUTES OF.

Limitation of action against magistrates, under the Highway Act. See HIGHWAY, 1. . . .

### *Debt on Covenant.*

1. Debt on covenant for payment of a rent-charge, as being an action of debt upon specialty, may be brought within twenty years, by 3 & 4 Will. 4, c. 42, s. 3, notwithstanding the limitation of six years, by 3 & 4 Will. 4, c. 27, s. 42, as to the recovery of rent payable out of land. *Strachan v. Thomas.* 229

### *Acknowledgment.*

2. An acknowledgment of part payment by a defendant, to take a debt out of the Statute of Limitations, under 9 Geo. 4, c. 14, s. 1, must not only be in writing, but be signed by him. *Bayley v. Ash-ton.* 204

## MAGISTRATES.

Limitation of time in bringing action against magistrates, and costs. See HIGHWAY, 1.

Order stopping up road on view. See HIGHWAY, 2.

Whether bound to give restitution of lands. See RESTITUTION.

Warrant of apprehension by, against witness to give bail for attendance at the assizes. See EVIDENCE, 1.

Certificate of dismissal of charge of assault. See ASSAULT.

Jurisdiction over offences committed on high seas. See CONVICTION.

Indorsement of warrant by magistrate of another county. See CONSTABLE.

Excise conviction, notice to accused to appear. See EXCISE.

*Affidavits to disprove Jurisdiction.*

Although affidavits are admissible for the purpose of shewing that a magistrate has made an order without jurisdiction, yet as the test of jurisdiction, with respect to the right of a magistrate to deal with any particular case, is whether he had power to *commence* the inquiry, and not whether he has in the course of it come to right conclusions, affidavits are not admissible merely to disprove the existence of any fact stated in the information, because the power of the magistrate to *commence* the inquiry depends not upon the question whether the statements contained in the information are true or false, but upon the question whether the facts, as stated in the information, do or do not amount in law to an offence over which he has jurisdiction.

Where, therefore, magistrates made an order, under 59 Geo. 3, c. 12, s. 24, directing possession of a parish house to be given up to parish officers, upon an information stating that a pauper who had been permitted to occupy a parish house had refused to give it up on proper demand, the Court would not admit affidavits in contradiction of any of the statements in the information, for the purpose of shewing that the magistrates had acted without jurisdiction. *Reg. v. Bolton.* 679

**MANDAMUS.**

Mandamus to the Queen. See COPYHOLD, 3.

To steward only of manor. *Ib.*

Mandamus or Quo Warranto. See BOROUGH, 1.

Mandamus, Trespass, or Quare Impedit. See DEAN AND CHAPTER.

Mandamus to the master and brethren of a hospital to elect a presentee to a vicarage. See ELECTION.

To justices under local act to appoint overseers nominated at vestry. See VESTRY, 2.

To rector, &c., to convene vestry for the election of churchwardens. See VESTRY, 3.

To proceed to election of vestrymen. See VESTRY, 1.

To justices to give restitution of lands. See RESTITUTION.

To railway company, to enforce payment of calls, in order to raise assets for payment of creditor. See RAILWAY, 2.

1. Mandamus does not lie to compel the repair of a turnpike road. *Reg. v. Trustees of Oxford and Witney Roads.* 154

2. Where a plaintiff has obtained judgment against a corporation, the Court will not issue a mandamus to them, ordering them to pay the amount of judgment merely on the ground that an execution may turn out fruitless.

Where the directors of an incorporated company, authorized to make calls on the shareholders, had made such calls, but they had not been paid, and the original directors had all ceased to be so, and no new directors had been appointed, the Court refused a mandamus to compel the company to enforce the payment of the calls that had been made. (*Quære*, see the rule, and the judgment.) *Reg. v. Victoria Park Company.* 639

3. A writ of mandamus commanded a person to deliver up to the clerk of a court of requests papers relating to the office. The writ did not shew any claim by the person detaining to hold them under any right:—*Held*, that the writ was therefore bad, and that the defect could not be supplied by the return, on which it appeared that he claimed to be the lawful clerk of the court, and to retain the papers as such. *Reg. v. Hopkins.* 550

4. Where a return to a mandamus is

set down for argument on a concilium, the defendant may take objections to the writ in matters of substance. *Reg. v. Powell.* 723

## MASTER AND SERVANT.

### *Liability for Negligence.*

A butcher, who had purchased a beast at Smithfield, in the city of London, employed a licensed drover to drive it home. By the by-laws of the city, such beasts must be driven, while within the limits of the city, by licensed drovers, unless driven by the purchasers themselves. The drover employed a boy to drive the beast, and through the boy's negligent driving, the beast, after it had passed the limits of the city, ran into the plaintiff's premises and damaged his property.

*Held*, that, although the damage was not done within the city, the boy was not to be deemed the servant of the owner of the beast, and that the owner therefore was not liable. *Milligan v. Wedge.* 714

## MERCHANDISE.

Railway sleepers not goods, wares or merchandise. See GOODS, WARES AND MERCHANDISE.

## MESNE PROFITS.

Recovered in ejectment, without notice of trial. See EJECTMENT.

## MINES.

Poor rate. See POOR, 8.

## MISTAKE.

What cured as, on a sale of land under Land Tax Redemption Acts. See LAND TAX.

## MONTHS, CALENDAR.

See POOR, 11.

## MORTGAGE.

### *Tenancy of Mortgagor to Mortgagee.*

A mortgage deed of the 11th January, 1836, contained a covenant to surrender copyhold property to the mortgagee in fee, as a security for a debt of 850*l.*, which was to be repaid on the 11th July following, and gave the mortgagee power of sale on default. The deed then contained a clause that the mortgagor should, during his occupation of the premises, yield and pay to the mortgagee the yearly rent or sum of 50*l.*, by equal half-yearly payments, on the 11th July and the 11th January in every year, the first half-yearly payment to be made on the 11th July next, and that it should be lawful for the mortgagee to have and use such remedies by distress as landlords have for rent upon common demises, *provided that the reservation of such rent should not prejudice the right of the mortgagee to enter into and take possession of the premises covenanted to be surrendered, and evict the mortgagor, at any time after default made in payment of the monies thereby intended to be secured.* In November, 1837, the mortgagee distrained for 50*l.*, "being for rent due up to the 11th July last:"—*Held*, that the above reservation of rent, and distress for rent, had not created the relation of landlord and tenant between the parties, so as to entitle the mortgagor to notice to quit before ejectment. *Doe d. Garrod v. Olley.* 275

## MUNICIPAL CORPORATION ACT.

See BOROUGH—BURGESS LIST.

## NAVIGABLE RIVER.

See OYSTER SPAT.



### NEGLIGENCE.

See MASTER AND SERVANT.

*Case where Plaintiff himself contributes to the Injury complained of.*

Defendant left his horse and cart unattended, for half an hour, in a public street. During his absence, the plaintiff, a child between six and seven years old, got upon the cart. While the plaintiff was there, another child caused the horse to move on, and the plaintiff fell in consequence, and was hurt.

*Held*, that defendant was liable in an action on the case for negligence, although the plaintiff had partly occasioned the accident by his own trespass. *Lynch v. Nurdin.* 672

### NEW TRIAL.

*Damages under Twenty Pounds.*

1. The rule, that a new trial will not be granted where the verdict is against evidence if the damages are under 20*l.*, applies to cases of surprise and to actions of trover. *Branson v. Didsbury.* 441

*In Ejectment.*

2. In the exercise of its discretion, the Court will in ejectment, as in other actions, grant a new trial upon payment of costs, and other equitable conditions, where the cause coming on unexpectedly has been tried as an undefended cause.

The Court will not require the payment of costs as between attorney and client.

The Court, in such a case, imposed as a condition, that the defendant should not set up an outstanding term. *Doe d. Cooling v. Appleby.* 538

### NOMINATION.

See VESTRY, 1, 2.

### NON TENUIT.

See PLEADING, 4.

### NOTICE.

Of action. See HIGHWAY.

Of trial. See EJECTMENT.

Of certiorari. See CERTIORARI.

Of church rate. See CHURCH RATE.

Of dishonour. See BILL OF EXCHANGE, 3, 4.

Of distress for more rent than due. See CASE.

To quit. See LANDLORD AND TENANT, 3—MORTGAGE.

To produce. See EVIDENCE, 3.

To party, to appear to a charge under Excise Acts. See EXCISE.

To putative father. See BASTARDY, 2.

### NUNC PRO TUNC JUDGMENT.

See INSOLVENT, 5—JUDGMENT.

### OUTSTANDING TERM.

See ESTATE, 1—NEW TRIAL, 2.

### OVERSEERS.

Election of. See VESTRY, 2.

Obligation to bury parish pauper. See BURIAL.

Action against, for not signing burgess list. See BURGESS LIST.

### OYSTER SPAT.

*Dredging—Illegality.*

Dredging for oyster spat in a common navigable river is illegal under 13 Ric. 2, stat. 1, c. 19.

Therefore where the declaration was in trespass quare clausum fregit; plea, that the locus in quo was part of a common navigable river, in which the public had a right to fish, and that defendant entered to fish for oyster spat; replication, that oyster spat was the spawn or young brood of oysters, unfit for the food of man; rejoinder, that the public had the right of fishing for oyster spat in a



public river:—*Held*, ill on demurrer.

*Quære*, if the defendant had pleaded that he took the oyster spat for the purpose of bringing it to perfection? *Mayor, &c., of Maldon v. Woolvet.* 26

### PARISH PROPERTY.

Order of magistrates requiring pauper to give up possession of a parish house. See **MAGISTRATES**.

*Title to Lands where Parish forms part of a Union.*

1. Although a parish forms part of a union under 4 & 5 *Will.* 4, c. 76, the parish land is not divested out of the churchwardens and overseers, so as to disable them from bringing ejectment, either by s. 21 of that act, or by 5 & 6 *Will.* 4, c. 69, s. 3. *Doe d. Norton and Wheeler v. Webster.* 270

*Parish Money, Information for misapplying.*

2. By 4 & 5 *Will.* 4, c. 76, s. 97, "if any overseers, &c. shall purloin, embezzle, or wilfully waste or misapply, any of the monies, &c. belonging to any parish, &c., every such offender shall, upon conviction before any two justices, forfeit for every such offence any sum not exceeding 20*l.*," &c.

*Held*, that an information against a parish officer for "misapplying," without the word "wilfully," was bad. *Carpenter v. Mason.* 439

### PARSON.

Right of rector to preside at vestry meeting. See **VESTRY**, 3.

*Rateability of Tithes.*

See **POOR**, 7.

### PARTICULARS OF DEMAND.

As affecting evidence and pleading. See **EVIDENCE**, 6—**PLEADING**, 6.

### PARTNERSHIP.

After dissolution of, right of partner to indorse partnership bill. See **BILL OF EXCHANGE**, 1.

### PAYMENT.

Acknowledgment of part payment. See **LIMITATIONS, STATUTES OF**, 2. What admitted by payment into Court. See **EVIDENCE**, 6.

### PEACE, ARTICLES OF THE.

This Court has power to review the decision of the Quarter Sessions in binding a party over on articles of the peace exhibited against him.

Where the return to a habeas corpus states that the prisoner has been committed for not finding sureties of the peace, according to an order of sessions on articles of the peace there exhibited, the order and the articles may be removed by certiorari, and, if the articles are insufficient, the prisoner will be discharged.

The exhibitant must swear to threats, conveyed either by words or conduct, of personal violence; and it is not enough merely to state facts from which the Court may infer such threats.

Where articles of the peace were returned by certiorari, and affidavits made by others than the exhibitant were subjoined on the same parchment, and the whole ended with the following jurat;—"Sworn by the several deponents," &c.:—*Held*, that it sufficiently appeared that the articles had been exhibited on oath. *Reg. v. Dunn.* 415

### PERJURY.

Indictment for. See **INDICTMENT**. Costs on action for malicious prosecution for perjury. See **COSTS**, 2.

### PETTY SESSIONS.

See **BASTARDY**.

## PLEADING.

Criminal Pleading. See ASSAULT—INDICTMENT.

Declaration on agreement to demise. See VARIANCE.

Against overseer for not signing burgess list. See BURGESS LIST.

On breach of covenant for quiet enjoyment. See EVIDENCE, 5.

1. A declaration for rent, by assignee of a reversion for the life of a third person against assignee of the term, omitted to aver that cestui que vie was living when the rent accrued due:—*Held*, that the continuance of the life was not to be implied from the mere deduction of title, and an averment in the breach that “after plaintiff became so seised the rent become due and still is in arrear to the plaintiff;” and that the declaration was bad on general demurrer. *Fryer v. Coombs*. 120  
See also POWER OF APPOINTMENT.

*Pleas.*

What pleas allowed in action by Railway Company for calls. See RAILWAY, 2.

Plea amounting to constructive denial of indorsement of bill of exchange. See BILL OF EXCHANGE, 2.

Plea of payment into Court, what admitted by. See EVIDENCE, 6.

Plea of illegality to an action to recover price of spirituous liquors. See SPIRITUOUS LIQUORS.

*Not possessed.*

2. The plaintiff was master of a school, which was under the controul of trustees, and, as such, was allowed to occupy a school house. The trustees had drawn up certain rules, one of which provided for the master's dismissal in case of misconduct. In pursuance of this rule the trustees on the 28th June dismissed the plaintiff, who acquiesced in the dismissal, and the school was then peaceably taken

possession of by the trustees, and locked up. On the following day the plaintiff re-entered by force. On the 11th July he was ejected by the trustees. To trespass against them for such eviction, the trustees pleaded that the plaintiff was not possessed.

*Held*, That the plaintiff having re-entered by trespass, had not by the very act of the trespass acquired possession, within the meaning of the plea, against the trustees, who had never acquiesced in his re-entry.

That the written rules for the regulation of the school were not an agreement within the Stamp Act. *Browne v. Dawson*. 355

*Lien.*

3. Evidence of lien is not admissible under the general issue in trover. *White v. Teale*. 43

*Non tenuit—Riens in arriere.*

4. Replevin. *Avowry* for 20*l.* as a half-year's rent in arrear. Pleas: 1. *Non tenuit*; and 2. As to 2*l.* 10*s.* *riens in arriere*.

At the foot of the indenture of lease, which expressed the rent of the premises demised to be 40*l.* a year, and before its execution were written the words “the allowance for the road to be made as usual.” These words referred to an allowance (which had been usually made to the tenant of the demised premises) of 2*l.* 10*s.* half-yearly, being a sum paid by him to an adjoining occupier for a right of way to the demised premises.

*Held*, that this allowance was, at most, a mere covenant, and not an alteration of the rent so as to support the plea of *non tenuit*.

*Quære*, whether payment of the sum mentioned in the allowance supported the plea of *riens in arriere*. *Davies v. Stacey*. 157

Plea, of fraudulent removal, to

trespass for taking goods, see *post*, 5.

*Replications.*

Similiter without date. See SIMILITER.

To pleas justifying a trespass under a distress for rent, replication of tender. See LANDLORD AND TENANT, 2.

*De injuriâ.*

5. To trespass for entering the plaintiff's house and taking his goods; the defendants pleaded that on the 5th Nov. 1838, and for a long time then past, and from thence until and at the time when &c. the plaintiff held a certain other house of certain persons (naming them), as tenant thereof to those persons, under a demise before then made by them, upon which demise a certain weekly rent of 7s. was reserved to them. The plea then stated that rent was in arrear, and that the goods were seized, as having been fraudulently removed from the house demised, to the house in which &c.

*Held*, That the demise was stated with particularity sufficient to be good on general demurrer.

*Quære*, whether plea good on special demurrer.

That the plea set up the authority of the plaintiff to follow and seize the goods, it being an authority which the law annexed to the contract made by him as tenant, and that the replication of *de injuriâ* was bad within the third resolution in *Crogate's* case. *Bowler v. Nicholson.* 16

*New Assignment, when necessary.*

6. Common count in debt for work and labour.

Particulars of demand for contract work and extra work.

Plea, that the work in the count mentioned was done under a contract that before commencement

of suit there was a dispute between the parties as to whether the plaintiff had properly performed the contract, whereupon, to end the dispute, it was agreed that the defendant should accept the work at a price below the original contract price: that by virtue of the last-mentioned agreement defendant became indebted to the plaintiff in the sum in the count mentioned; and that afterwards, in pursuance of the last-mentioned agreement, defendant paid the plaintiff, and plaintiff accepted, the sum in the count mentioned in full satisfaction &c.

Replication, traversing the payment and acceptance &c.

*Held*, that, as the plaintiff had not new assigned, he could not recover for the extra work. *Rogers v. Custance.* 574

*Replication to Plea of Payment.*

7. A replication, to a plea of payment into Court, that the defendant was indebted in a larger amount, omitting, "and still is," is bad on special demurrer. *Faithful v. Ashley.* 524

*Profert. Plea to a Declaration alleging Excuse of Profert.*

8. The plaintiff in covenant alleged as excuse for profert that the deed, "being in the possession of the defendant," the plaintiff was unable to produce it:—*Held*, that a plea which stated only that the deed "is not in the possession of the defendant modo et formâ" was bad. *Fisher v. Ford.* 347

*Negative pregnant.*

9. To a declaration for goods sold, the defendant pleaded that the goods were sold with the plaintiff's privity by one H. as the owner thereof; that defendant had no knowledge that the goods belonged to the plaintiffs, and that the defend-

ant had a set-off against *H.* Replication, that the goods were not sold with the plaintiffs' privity by *H.* as the owner thereof. The Court set aside a demurrer to the replication, as frivolous. *Pigeon v. Osborn.* 345

*Modo et Forma.*

What it puts in issue. See ASSAULT.

*Verdict, what cured by.*

See DEFAMATION, 2—LANDLORD AND TENANT, 2.

POLL.

See VESTRY.

POOR.

See BASTARDY.

As to misapplication of parish property by overseer, see PARISH PROPERTY.

As to property in lands of parish forming part of a union, see PARISH PROPERTY.

As to burial of paupers. See BURIAL.

*Orders of Poor Law Commissioners, Appointment of Chaplain to a Union.*

1. It is not essential, to the validity of any but general orders of the Poor Law Commissioners to the guardians of an union, that they should be submitted to the Secretary of State; 4 & 5 Will. 4, c. 76, s. 16.

If an order is directed to one union only, it is not a general order, though an order in the same terms is simultaneously directed to another union.

Under the stat. 4 & 5 Will. 4, c. 76, s. 15, the commissioners have power to rescind or alter any order made by them, and an order, inconsistent to some extent with a former one, will have the effect of altering that former order, and will be valid itself.

Under the 46th section, the commissioners have power to order

the guardians to appoint a chaplain. He is an officer under that section "for carrying the provisions of the act into execution," the purview of the act shewing that it was intended by the legislature that spiritual functions should be performed in the workhouses for the benefit of the paupers. *Reg. v. The Guardians of the Braintree Union.* 593

*Guardians, incomplete Election of.*

2. On the formation of a poor law union, one parish altogether neglected to elect any guardian. There were two elections of guardians after the first, and at those also the same parish neglected to elect any guardians.—*Held*, that, even if at the first election the board of guardians was incomplete, the defect was cured by the 38th sect. of the Poor Law Amendment Act, which gives validity to a board elected subsequently to the first election, though the full number of guardians be not elected. *Semble*, that the board was a good board even the first year. *Reg. v. The Overseers of the Todmorden Union.* 553

*Poor Rate.*

*Charitable Institution, Rateability of.*

3. The Society of Friends conveyed certain premises to trustees, as a school for the education of poor children. A committee met at the school once a quarter for the management of its affairs, and appointed a sub-committee, who met there once a month, and in the intervals the management was confided to a superintendent, who resided on the premises and received a salary. No child was eligible whose parents could defray the charge of its education elsewhere. The average expense of maintaining and educating each child was 20*l.* a year, towards which the child's friends, if able, were required to pay 12*l.* a year. The children,

servants, matron and superintendent, were the only persons who resided on the premises.

*Held*, that the trustees were occupiers, and that the payment of 12*l.*, although it produced no gain on the balance, was a profit, which made them beneficial occupiers, and, therefore, chargeable to the poor rate in respect of the premises. *Reg. v. Sterry.* 122

4. The Treasurer of the London Missionary Society was rated to the relief of the poor, in respect of a house taken by this society, under a lease, for religious and charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, and neither did he nor any other person connected with the society derive any profit from the occupation of the premises:—*Held*, that he was not rateable to the relief of the poor.

But *held*, that he was properly assessed to a church rate, under an act extinguishing tithes in the parish, and authorising a yearly church rate to be made, in order to raise money for the payment of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because beneficial occupation was not material in the latter case. *Reg. v. Wilson.* 130

#### *Of Gaol.*

5. The governor of a county house of correction occupied a house and garden within and parcel of the said prison. He was obliged by the rules of the prison to reside within the walls, and the accommodation provided was not greater than was necessary to enable him to do so, and perform his duties:—*Held*, that he was not liable to be assessed to the poor rate.

*Held*, also, that the matrons and turnkeys, occupying dwellings within the walls for the like purpose of the proper discharge of their duties, were not liable.

*Held*, that the justices were not liable to be rated in respect of the said prison, &c. in which work was done by the prisoners, partly for the use of the prison and partly for hire, the produce being applied in reduction of the expenses of the prison. *Reg. v. Shepherd.* 554

#### *Of Borough Property.*

6. A corporation is not rateable to the relief of the poor in respect of lands, of which the profits are payable to the borough fund, under 5 & 6 *Will.* 4, c. 76, s. 92, although the land is situate in a parish without the limits of the borough. *Reg. v. Inhab. of Exminster.* 69

#### *Of Tithes.*

7. The occupiers of lands were rated to the relief of the poor on an estimate of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and deducting from such rent the probable annual costs of the repairs, insurance, and other expenses necessary to maintain them in a state to command such rent, according to 6 & 7 *Will.* 4, c. 96.

The vicar, who received 660*l.* a year as a composition for small tithes, out of which he paid 82*l.* 15*s.* for tenants' rates and ecclesiastical dues, was rated on 540*l.* as being the sum which the said tithes might reasonably be expected to let for from year to year, free of all tenants' rates and taxes, and deducting from such rent the amount of the ecclesiastical dues.

The occupiers, from the capital, time, and skill employed in the cultivation of their lands, made a profit, which on an average amounted

to two-thirds of the rent estimated above.

*Held*, that the rate followed the directions of 6 & 7 Will. 4, c. 96, s. 1, which apply to tithes as well as land, and that it could not be objected to on the ground that it was unequal because the rent so estimated, on which the occupiers were rated, bore a smaller proportion to the profits of the land, than the sum at which the vicar was rated bore to the yearly value of his tithes. *Reg. v. Capel.* 87

#### *Of Mines.*

8. The owner of wastes and of the mines and minerals under them demised certain lead mines for twenty-one years, the lessees to yield one-fifth share of the ore raised by them, well cleansed, and made merchantable and fit for the smelting mill. The ore before delivery to the lessor had to undergo a very laborious and expensive process in being bruised, dressed and made merchantable and fit for smelting, by which all foreign substances were separated from the ore, but the character of the ore was not otherwise altered:—*Held*, that the lessor was liable to the poor rate in respect of his fifth, as an occupier of land. *Reg. v. Todd.* 335

#### *Of Cemetery Company.*

9. A company was empowered by statute to purchase land for the purpose of a cemetery, and to lay out and inclose the same, and to build therein vaults and catacombs, and to sell in perpetuity or for a limited period *the exclusive right* of interment in them, subject to such regulations and conditions as the company should think fit. The purchasers of such exclusive right of interment in such vaults, &c. were to close them up with doors. The company was required to keep the cemetery and the several build-

VOL. IV.

ings therein, and the external walls and fences thereof, in complete repair, and was restrained from selling any land which should have been consecrated and set apart for the burial of the dead. The company having under these provisions established the cemetery, &c. annually sold in perpetuity the exclusive right of interment in vaults, &c. erected by them. The purchasers had the keys of such vaults delivered to them after closing them up as directed, and the purchasers did all necessary repairs to such vaults, &c., the company never exercising any act of ownership therein after such sales.

*Held*, that the company occupied the lands in which such exclusive right had been sold, and was liable to the poor rate in respect of the purchase money, as a profit of such land. *Reg. v. Inhabitants of Kensington.* 327

#### *Settlement.*

##### *Irish Poor. Settlement by Birth.*

10. An English-born emancipated child of Irish parents, who have no settlement, has a birth settlement, and is not removeable with his parents, under the statutes for passing Scotch and Irish paupers. *Reg. v. Inhabitants of Preston.* 509

##### *By Renting a Tenement.*

11. A pauper became tenant of premises under a written demise for the term of six months, from the 1st of January then next, and so on from six months to six months, until six calendar months' notice to quit by either party, at the rent of &c. for every six months, the first payment to become due on the next 1st of July:—*Held*, that the circumstances of the rent being payable at intervals of six calendar months, and of six calendar months' notice to quit being required, rebutted the presumption arising

3 E



from the word "months" standing alone, and shewed that calendar months were meant; that the taking was therefore for one half year, and so from half year to half year as long as both parties should please, that such a taking was in law a taking for one year at least, and consequently there was a renting for one whole year within the meaning of the statute 6 Geo. 4, c. 57. *Reg. v. Inhabitants of Chawton.* 525

12. In January, 1831, *M.* being in possession of premises as tenant from year to year, upon a taking from Martinmas to Martinmas, at the yearly rent of 10*l.*, payable half-yearly at May-day and Martinmas, gave up the premises to the pauper, and the landlord then agreed to take the pauper as his yearly tenant, provided he would answer for the current half year's rent. The pauper then entered, and continued to occupy till October, 1832. At May-day, 1831, he paid 5*l.* for the rent then due, and at Martinmas, 1831, he paid another 5*l.* for the rent due up to that time. He continued in the occupation until October, 1832, without paying any more rent. He then agreed with *R.* that *R.* should have possession, and should take his fixtures at 5*l.* and his furniture at 4*l.* 5*s.*, and should pay the landlord the 9*l.* 5*s.* for the rent due since Martinmas, 1831. *R.* took possession, and shortly after the landlord agreed to accept *R.* as tenant, and received from him an undertaking that he would pay the rent due from the pauper. At Martinmas, 1833, *R.* having failed to pay that or any subsequent rent, the landlord distrained for the whole amount. The distress, which consisted in part of the fixtures and furniture transferred by the pauper to *R.* to the value of 5*l.*, paid the rent.

*Held*, that there had not been a

payment of a year's rent by the pauper, so as to satisfy 1 *Will.* 4, c. 18, s. 1. *Reg. v. Inhabitants of Melsonby.* 515

#### *By Hiring and Service.*

13. A yearly servant left his master's house from illness before the end of the year, and went and resided at his father's house in a different parish, where he remained to the end of the year, his master supplied him with food and medical attendance for the entire period he was absent, and paid him wages for the whole year:—*Held*, that the pauper gained a settlement by hiring and service in the parish where he resided during his illness. *Reg. v. Inhab. of East Winch.* 342

#### *Grounds of Appeal.*

14. An examination of a pauper stated a settlement by apprenticeship. The notice of the grounds of appeal stated that the pauper did not acquire a settlement by apprenticeship, because the premium was paid by the parish officers, and the regulations of the statute for binding parish apprentices were not observed:—*Held*, that the execution of the indenture of apprenticeship was admitted.

*Semble*, the notice of the grounds of appeal was altogether bad for generality. *Reg. v. Inhabitants of St. John, Margate.* 653

#### POSTEA.

See AMENDMENT, 2.

#### POWER OF APPOINTMENT.

See ESTATE, 2—PLEADING, 1.

A power to demise lands, or any part of them, is not well executed by a demise of part, with liberty of shooting over the whole.

Where it is necessary to a plea of justification, under a lease from

tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer. *Dayrell v. Hoare*. 114

### PRACTICE.

See AMENDMENT — CERTIORARI — COSTS — HABEAS CORPUS — INSPECTION OF DOCUMENTS — NEW TRIAL — PROCESS — PROHIBITION, 1 — SIMILITER.

What pleas allowed in action for calls. See RAILWAY, 2.

### PREBENDARY.

See DEAN AND CHAPTER.

### PREROGATIVE.

See COPYHOLD, 4.

### PRESENTATION.

See DEAN AND CHAPTER — ELECTION.

### PRINCIPAL AND AGENT.

See FRAUDS, STATUTE OF, 2 — MASTER AND SERVANT.

### PRIVILEGED COMMUNICATION.

See DEFAMATION.

### PROCESS.

See PROHIBITION, 2.

By the Hull Court of Requests' Act, a summons for a debt may be served by leaving it, at the dwelling-house of the debtor, with his servant or other person belonging to him, and, if he does not appear, the creditor may proceed *ex parte* to judgment and execution.

A summons was left with his wife at the house where the debtor, who was a seafaring man, and absent on a voyage to the East Indies, had lived before his departure from

England, and where the wife still lived.

*Held*, that the summons had been duly served and that the creditor might proceed to execution. *Culverson v. Melton*. 445

### PROFERT.

See PLEADING, 8.

### PROHIBITION.

*To Ecclesiastical Court, where Irregularity of Practice only; Subtraction of Church Rate.*

1. It is no ground for prohibition to the ecclesiastical court, that depositions have been improperly taken with reference to 10 *Geo.* 4, c. 53, s. 9, for this is matter of irregularity in practice only.

A cause for subtraction of church rates is within the exceptive part of 23 *Hen.* 8, c. 9, and may be referred by letters of request to the Court of Arches, and the defendant be cited out of his diocese. *Jolly v. Baines*. 224

See also CHURCHWARDENS.

*Significavit — De Contumace Capiendo — Appeal — Subtraction of Church Rate.*

2. The return to a habeas corpus set out a writ de contumace capiendo, reciting the significavit of "*H. J. &c.* Official Principal, &c." which stated that the defendant, "*W. B.* of the Market Place in the borough of L., a parishioner and inhabitant of the parish of St. M., in the said borough of L., in the county of L., had been duly pronounced guilty of contumacy, &c. in not obeying the lawful commands to pay to &c., the churchwardens of the said parish of St. M., the sum of 2*l.* 5*s.*, rated and assessed upon him &c. pursuant to a monition duly issued under the seal of the said Arches Court, and duly and personally served on him the said *W. B.* &c.,



of us the said *H. J.* by not paying &c., pursuant to the said monition, in a certain cause or business of subtraction of church rate, depending &c., and the proceedings wherein were carried on in pain of the contumacy of the said *W. B.*, duly cited to appear in the said cause &c., with the usual intimation, but in nowise appearing, nor would he submit to the ecclesiastical jurisdiction:—*Held*, 1. That the signification, that the defendant was contumacious, was properly issued by the Official Principal of the Arches. 2. That although the defendant had not appeared in the ecclesiastical court, this Court would not discharge him on habeas corpus, for, if it was the practice of the ecclesiastical court to give judgment against an absent party, there was nothing to shew such practice was illegal: and, if the practice was not so, the remedy of the party was by appeal. 3. That it sufficiently appeared on the return that the suit was to enforce the payment of a church rate; and therefore that it was within the jurisdiction of the spiritual court. 4. That the subject-matter of the suit appearing to be *prima facie* within the jurisdiction of the spiritual court, this Court would not presume the existence of any facts which might either deprive the spiritual court of jurisdiction, or afford a defence to the party. 5. *Quære*, whether the defendant was correctly described according to 58 *Geo. 3*, c. 127, sched. (B), but held that the misdescription could not be taken advantage of upon motion to discharge the defendant, on a return setting out the writ, and on affidavit verifying a copy of the writ, as the proper course would have been to move to set aside the writ itself for irregularity. 6. That an indorsement on the writ that it had been delivered of record

to the sheriff of L. before our lady the queen &c. was sufficient within the statute 5 *Eliz. c. 23*, s. 2. *Reg. v. Baines.* 362

### PROPRIETORS.

A local drainage act directed that the commissioners should be elected by the proprietors of the lands within the parish:—*Quære*, whether, by the term “proprietors” was meant those who had the actual control of the lands, or the strict owners in fee. *Reg. v. Kelk.* 185

### PROXY.

See STAMP, 1.

### PUBLICAN.

Sale of liquors under 20s. at one time. See SPIRITUOUS LIQUORS.

### PUBLICATION.

Proof of. See EVIDENCE, 10.

### PUTATIVE FATHER.

See BASTARDY.

### QUARE IMPEDIT.

See DEAN AND CHAPTER.

### QUARTER SESSIONS.

See POOR—BASTARDY.

### QUEEN.

Mandamus to. See COPYHOLD, 3.

### QUEEN'S BENCH.

Jurisdiction of. See MAGISTRATES, 1. —PEACE, ARTICLES OF—PROHIBITION.

### QUIET ENJOYMENT.

Covenant. See EVIDENCE 5.

## QUO WARRANTO.

Quo warranto, or mandamus. See BOROUGH, 1.

*Affidavit on Rule for.*

A statement in an affidavit for a quo warranto information against a town councillor, that the defendant had taken on himself the office, and had been seen acting as a councillor at two meetings of the town council, is sufficient. *Reg. v. Quayle* 442

## RAILWAY.

Rule for shareholder to inspect railway books. See INSPECTION OF DOCUMENTS.

Railway sleepers, whether goods, wares or merchandise. See GOODS, WARES AND MERCHANDISE.

*Mandamus to compel Completion of Line.*

1. Where the Court had made a rule absolute for a mandamus to a railway company to proceed to complete their line according to their act of parliament, on affidavits by which it appeared that the Company had no intention to proceed with their works, and the writ, which issued in consequence recited that the Company had purchased lands from L. to C., but had made no provision for executing the line from C. to Y.; and that C. S. was the owner of land between C. and Y. through which the line in the plan of the Company passed, and that he had required the Company to set out the line and to proceed to complete the railway from C. to Y., but the Company refused to purchase the lands necessary &c. or to set out and complete the said line, and thereupon commanded the Company to complete the railway &c.: *Held*, that the writ was ill, as it contained no averment that the Company had given up their design, or that they were not effecting it with all convenient speed,

and the Court could make no inference to that effect. *Reg. v. Eastern Counties Railway Company.* 46

*In an Action for Calls, what Pleas allowed.*

2. By a railway act a company were allowed, in debt for calls, to declare generally that the defendant, being the proprietor of a share, was indebted to the company in such a sum as the calls should amount to, whereby an action had accrued, without setting forth the special matter; and it was also provided that at the trial of such an action it should only be necessary to prove that the defendant, at the time of making such calls, was the proprietor of a share, and that such calls were in fact made, and that such notice was given as directed by the act, without proving the appointment of the directors who made such calls, or any other matter whatsoever.

The Court in their discretion under the statute of *Anne*, out of the following pleas in several cases, allowed the first three only.

1. Nunquam indebitatus.
2. That defendant was not a proprietor.
3. That the shares were forfeited.
4. That at the meetings at which the calls were made there was not present a competent number of directors who had paid up previous calls.
5. That no notice had been given of the calls (as required by the act).
6. That no time or place for payment of the calls had been appointed (as required by the act.)
7. That the calls were not made for the purposes of the undertaking.
8. That the calls were not made upon all the shareholders (as required by the act).
9. That the calls were not made

by competent persons. *South-Eastern Railway Company v. Hebblewhite.* 246

### RECTOR.

Right to preside in vestry. See VESTRY, 3.

### REGULA GENERALIS.

See EJECTMENT.

### REMAINDER.

See ESTATE, 2—WASTE.

### RENT.

Apportionment of. See AGREEMENT.  
Distress for. See APPRAISEMENT—  
CASE—LANDLORD AND TENANT.

### RENT-CHARGE.

Debt for payment of. See LIMITATIONS, STATUTES OF, 1.

### REPAIR.

Mandamus to repair. See MANDAMUS, 1.

### REPEAL OF STATUTE.

See APPRAISEMENT—HIGHWAY—  
STAMP.

### REPLEVIN.

See AMENDMENT, 1.

### REQUESTS, COURT OF.

Execution, service of process. See PROCESS.

### RESTITUTION.

*Jurisdiction of Magistrates to cause Restitution to be made.*

Where the judges of assize, on an appeal against the decision of justices under 11 Geo. 2, c. 19, s. 16, ordering the possession of premises to be given directed “restitution to be made,” following the words of the act, and the convicting jus-

tices who gave possession refused to cause restitution to be made, on the ground of want of jurisdiction, the Court refused to order them so to do by mandamus.

*Quære*, whether the order of the judges of assize is not a sufficient authority for the sheriff to act upon. *Reg. v. Traill.* 325

### RIENS IN ARRERE.

See PLEADING, 4.

### RIVER.

Dredging in navigable river illegally. See OYSTER SPAT.

### ROAD.

See HIGHWAY.

As to Mandamus to repair. See MANDAMUS, 1.

### ROYAL MANOR.

See COPYHOLD, 3.

### RULE.

Having effect of judgment. See ARBITRATION, 1—ATTORNEY.

### RULE, GENERAL.

General Rule. See EJECTMENT.

### SALE.

See FRAUDS, STATUTE OF—LIEN.

### SCIRE FACIAS.

See BANKING COMPANY.

### SEAS.

Jurisdiction of magistrates to convict for offences on high seas. See CONVICTION.

### SEISIN.

See COPYHOLDS.

**SERVICE.**

See CERTIORARI—PROCESS.

**SESSIONS.**

See BASTARDY—POOR—PEACE, ARTICLES OF THE.

**SHELLEY'S CASE.**

Rule in. See ESTATE, 2.

**SHERIFF.**

See EXECUTION—FALSE RETURN—RESTITUTION.

**SHEW OF HANDS.**

See VESTRY.

**SHOOTING.**

Privilege of. See POWER OF APPOINTMENT.

**SIGNATURE.**

Overseers signing burgess list. See BURGESS LIST.

**SIGNIFICAVIT.**

See PROHIBITION, 2.

**SIMILITER.**

*Want of Date to.*

The common similiter, whether added by a party for himself or his adversary, is not a pleading within Reg. Gen. H.T. 4 *Will.* 4, r. 1, so as to require to be dated. *Edden v. Ward.* 155

**SLANDER.**

See DEFAMATION.

**SMUGGLING.**

See HABEAS CORPUS.

**SPECIALTY.**

Debt on. See LIMITATIONS, STATUTES OF, 1.

**SPIRITUOUS LIQUORS.***Illegality.*

The 24 *Geo.* 2, c. 40, s. 12, which enacts that no action shall be maintained for any sum or debt on account of any spirituous liquors, "unless such debt shall have really been and bonâ fide contracted at one time, to the amount of 20s. or upwards," applies not only to liquors sold for the personal consumption of the purchaser, but to liquors sold to a publican to sell again.

A plea, to a declaration for goods sold and delivered, stated that the sum was claimed for spirituous liquors supplied by plaintiff to defendant, and that no part of the sum or demand was bonâ fide contracted by defendant at any one time to the amount of 20s. or upwards.

On demurrer to the replication it was objected that, consistently with the plea, the sale in each case might have been of a quantity exceeding in value 20s., but reduced by prompt payment to a sum below it.

*Held*, that the plea sufficiently imported that the amount in value of each sale was less than 20s. *Hughes v. Done.* 708

**SPORTING.**

Privilege of. See POWER OF APPOINTMENT.

**STAMP.**

Stamp on rules for government of trust school. See PLEADING, 2.

1. Where, under a local act, a proxy to vote may be appointed by writing, the writing must be stamped. *Reg. v. Kelk.* 185

2. A deed, conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds

under the Stamp Act (55 Geo. 3, c. 184), and one stamp is sufficient. *Doe d. Hartwright v. Fereday*. 287

3. The defendant put his name as acceptor upon a blank bill stamp before the passing of the 3 & 4 Will. 4, c. 97, by which new stamps were substituted for those previously in use. After the day appointed for that act to come into operation, the other particulars requisite to constitute the paper a bill of exchange were added:—*Held*, that it was not a perfect bill at the time the acceptance was written upon it, and therefore that the old stamp was insufficient. *Abrahams v. Skinner*. 358

#### STATUTE.

Effect of repealed statute as to stamp on bill of exchange accepted in blank, but not drawn. See STAMP, 3.

#### SURPRISE.

See NEW TRIAL, 1.

#### TENDER.

Of deed for execution. See ELECTION.

Of rent. See LANDLORD AND TENANT, 2.

#### TERM, OUTSTANDING.

See ESTATE, 1—NEW TRIAL, 2.

#### TESTATUM WRIT.

Judgment in March, 1840, in an action, venue Yorkshire. A fi. fa. was issued into that county, under which a part of the debt was levied. 6th July a ca. sa. was issued into Middlesex, reciting only the fi. fa. and the return of it. 31st August a like ca. sa. was issued into Yorkshire, under which the defendant was arrested, but discharged on the ground of privilege. Afterwards, on the 7th January, 1841,

he was arrested on the Middlesex writ.

*Held*, 1st, that the Middlesex writ was irregular, as it did not contain a testatum clause of a writ into Yorkshire; and 2ndly, that the Court would not amend it, by inserting a testatum clause, the defendant having been actually arrested before any Yorkshire ca. sa. issued, and the application for amendment being very late, the rule for the discharge of the defendant having been obtained 13th January, and the cross rule for amendment only on Saturday the 30th January, the day before the rule came on for argument. *Towers v. Newton*. 625

#### TIMBER.

See LAND TAX.

#### TIME.

Computation of. See EXCISE—POOR, 11—WARRANT OF ATTORNEY.

#### TOWN COUNCILLOR.

See BOROUGH, 1.

#### TRESPASS.

Mandamus or Trespass. See DEAN AND CHAPTER—LANDLORD AND TENANT, 2—PLEADING, 2.

#### TROVER.

See NEW TRIAL, 1—PLEADING, 3.

#### TRUST DEED.

See STAMP, 2.

#### TURNPIKE ROAD.

See HIGHWAY.

Mandamus to repair. See MANDAMUS, 1.

#### UNION.

See PARISH PROPERTY, 1—POOR, 1.

**VARIANCE.**

See **AMENDMENT**, 1.

In assumpsit against a tenant for not repairing, the declaration stated an agreement on the part of the plaintiff to let on a certain day, and to put the premises in repair within twelve months, and on the part of the defendant to keep them in repair subsequently. Averment: that the plaintiff did repair within twelve months and did demise, and that the defendant occupied but did not keep in repair. Pleas: 1. Non assumpsit. 2. That defendant did not become tenant on the terms stated. It appeared that the agreement, in addition to the terms stated in the declaration, stated also that the plaintiff was to keep the premises insured, and to rebuild in case of fire.

*Held*, that the variance between the declaration and the agreement was ground of nonsuit. *Beech v. White.* 399

**VERDICT.**

See **AMENDMENT**, 2.

Defects not cured by. See **DEFA-  
MATION**, 2—**LANDLORD AND TE-  
NANT**, 2.

**VESTRY.**

Power of churchwardens alone to make church rate. See **CHURCH-  
WARDENS**.

1. Nomination of inspectors of votes, preliminary to the election of vestrymen, under 1 & 2 *Will.* 4, c. 60, s. 14.

*Quære*, if on such nomination a shew of hands is taken and the result disputed, is the question to be determined by a division of those present, or by a general poll.

At all events the decision of the returning officer as to the result of the shew of hands is not conclusive, if it appear to have been in-

VOL. IV.

fluenced by partiality. *Reg. v. St. Pancras, Vestrymen of.* 66

2. By a local act the inhabitants of each district in the parish, in vestry assembled, were to nominate a certain number of persons to be returned to justices at petty session, who were to select therefrom a certain number to be overseers.

At a vestry meeting for the above purpose, there was a contest as to the persons to be nominated, and after a shew of hands a poll was demanded:—*Held*, that the nomination was not necessarily to be confined to the persons present at the meeting, but that a poll might be lawfully had on a future day, so that other persons entitled to vote might take part in the nomination. *Reg. v. Hedger.* 61

3. The rector of a parish has the right to preside at a vestry held for the election of churchwardens, and also, as president of such meeting, to grant a poll, if demanded, and to fix the time and place of taking it. *Reg. v. Rev. Dr. D'Oyly.* 52

**VETO.**

See **ELECTION**.

**VIEW.**

See **HIGHWAY**, 2.

**VISITOR.**

See **ELECTION**.

**WAIVER.**

Of right to bring error. See **ERROR**.  
Of forfeiture. See **ESTATE**, 1.

Of residue of debt by acceptance of part, levied under *fi. fa.* See **FALSE RETURN**.

Of defect in writ of habeas corpus. See **HABEAS CORPUS**.

Of right to see warrant of commitment. See **CONSTABLE**.

Of right to have witnesses reheard by umpire. See **ARBITRATION**, 2.

**WARES.**

Goods, wares and merchandise, whether railway sleepers are. See **GOODS, WARES AND MERCHANDISE.**

**WARRANT OF APPREHENSION.**

To secure attendance of witness. See **EVIDENCE, 1.**

Warrant of commitment. See **CONSTABLE.**

**WARRANT OF ATTORNEY.**

*Time for Filing, where executed by Bankrupt.*

Under 3 Geo. 4, c. 39, which makes void, as against the assignees of a bankrupt, any warrant of attorney executed by him, unless filed "within twenty-one days after execution," the days are to be reck-

oned exclusively of the day of execution, and a warrant, therefore, executed on the 9th is duly filed on the 30th of the month. *Williams v. Burgess.* 443

**WASTE.**

*Interest necessary to support Action for Waste.*

Devise to A. and his wife to hold for their joint lives, and to the survivor for his or her life. The husband during the joint lives assigned, and the assignee committed waste:—*Held*, that the wife (who survived) could not maintain case for waste, she having only a contingent remainder at the time of the waste done. *Bacon v. Smith.* 651

**WITNESS.**

See **EVIDENCE, 1, 2.**

LONDON:

PRINTED BY C. ROWORTH AND SONS, BELL YARD,  
TEMPLE BAR.





